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THE SUPREME COURT—USURPER OR GRANTEE?[1]

DID the framers of the federal Constitution intend that the Supreme Court should pass upon the constitutionality of acts of Congress? The emphatic negative recently given to this question by legal writers of respectable authority[2] has put the sanction of the guild on the popular notion that the nullification of statutes by the federal judiciary is warranted neither by the letter nor by the spirit of the supreme law of the land and is, therefore, rank usurpation. Thus the color of legality, so highly prized by revolutionaries as well as by apostles of law and order, is given to a movement designed to strip the courts of their great political function. While the desirability of judicial control over legislation may be considered by practical men entirely apart from its historical origins, the attitude of those who drafted the Constitution surely cannot be regarded as a matter solely of antiquarian interest. Indeed, the eagerness with which the "views of the Fathers" have been marshalled in support of the attack upon judicial control proves

[1] The author desires to acknowledge his indebtedness to Mr. Birl E. Shultz, a graduate student in the School of Political Science of Columbia University, for preparing a bibliographical note on the writings of members of the Convention and for special researches in the papers of Roger Sherman and of John Dickinson.

[2] *Cf.* Chief Justice Walter Clark, of North Carolina, Address before the Law Department of the University of Pennsylvania, April 27, 1906; reprinted in *Congressional Record*, July 31, 1911. Dean William Trickett, of the Dickinson Law School, "Judicial Dispensation from Congressional Statutes," *American Law Review*, vol. xli, pp. 65 *et seq.* L. B. Boudin, of the New York Bar, "Government by Judiciary," POLITICAL SCIENCE QUARTERLY, vol. xxvi (1911), pp. 238 *et seq.* Gilbert Roe, of the New York Bar, "Our Judicial Oligarchy" (second article), *La Follette's Weekly Magazine*, vol. iii, no. 25, pp. 7-9, June 24, 1911.

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that they continue to exercise some moral weight, even if they are not binding upon the public conscience.

The arguments advanced to show that the framers of the Constitution did not intend to grant to the federal judiciary any control over federal legislation may be summarized as follows. Not only is the power in question not expressly granted, but it could not have seemed to the framers to be granted by implication. The power to refuse application to an unconstitutional law was not generally regarded as proper to the judiciary. In a few cases only had state courts attempted to exercise such a power, and these few attempts had been sharply rebuked by the people. Of the members of the Convention of 1787 not more than five or six are known to have regarded this power as a part of the general judicial power; and Spaight and three or four others are known to have held the contrary opinion. It cannot be assumed that the other forty-odd members of the Convention were divided on the question in the same proportion. If any conclusion is to be drawn from their silence, it is rather that they did not believe that any such unprecedented judicial power could be read into the Constitution. This conclusion is fortified by the fact that a proposition to confer upon the federal judges revisory power over federal legislation was four times made in the Convention and defeated.

A careful examination of the articles cited fails to reveal that the writers have made any detailed analysis of the sources from which we derive our knowledge of the proceedings of the Convention and of the views held by its members. They certainly do not produce sufficient evidence to support their sweeping generalizations. In the interest of historical accuracy, therefore, it is well to inquire whether the evidence available on the point is sufficient to convict the Supreme Court of usurping an authority which the framers of the Constitution did not conceive to be within the judicial province. If the opinions of the majority of the Convention cannot be definitely ascertained, any categorical answer to the question proposed must rest upon the "argument of silence," which, as Fustel de Coulanges warned the Germans long ago, is a dangerous argument.

Now at the outset of this inquiry one important fact should be noted.

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No proposition to confer directly upon the judiciary the power of passing upon the constitutionality of acts of Congress was submitted to the Convention. On this point a statement made in Chief Justice Clark's address, cited above, is misleading. The proposition to which he refers, and which formed a part of the Randolph plan, was to associate a certain number of the judges with the executive in the exercise of revisionary power over laws passed by Congress. This was obviously a different proposition. Indeed, some members of the Convention who favored judicial control opposed the creation of such a council of revision.[1] The question of judicial control, accordingly, did not come squarely before the Convention, in such form that a vote could be taken.

How are we to know what was the intention of the framers of the Constitution in this matter? The only method is to make an exhaustive search in the documents of the Convention and in the writings, speeches, papers and recorded activities of its members. It is obviously impossible to assert that any such inquiry is complete, for new material, printed or in manuscript, may be produced at any moment. This paper therefore makes no claim to completeness or to finality. It is designed to throw light on the subject and to suggest ways in which more light may be obtained.

In view of the fact that no vote was taken on this issue, we are compelled to examine the notes of the debates on every part of the Constitution and to search the letters, papers and documents of the members of the Convention to find out how many of them put themselves on record, in one way or another.

I

There were in all fifty-five members of the Convention who were present at some of its meetings. Of these at least one-third took little or no part in the proceedings or were of little weight or were extensively absent. Among these may be included: Blount, Brearley, Broom, Clymer, Fitzsimons, Gilman, W. C. Houston, William Houstoun, Ingersoll, Lansing, Living-

[1] *Cf. infra*, pp. 6, 8, 11.

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ston, McClurg, Alexander Martin, Mifflin, Pierce and Yates. It is of course difficult to estimate the influence of the several members of the Convention, and between the extremes there are a few regarding whom there may reasonably be a difference of opinion. The preceding list is doubtless open to criticism, but it may be safely asserted that a large majority of the men included in it were without any considerable influence in the framing of the Constitution.

Of the remaining members there were (say) twenty-five whose character, ability, diligence and regularity of attendance, separately or in combination, made them the dominant element in the Convention. These men were:

Blair	Franklin	*King*	*Morris, R.*	Rutledge
Butler	*Gerry*	*Madison*	*Paterson*	Sherman
Dayton	Gorham	*Martin, L.*	Pinckney, Charles	*Washington*
Dickinson	*Hamilton*	*Mason*	Pinckney, C. C.	*Williamson*
Ellsworth	*Johnson*	*Morris, G.*	*Randolph*	*Wilson*

This list, like the one given above, is tentative; and it is fair to say that, among those whose judgment is entitled to respect, there is no little difference of opinion about the weight of some of the men here enumerated. It cannot be doubted, however, that the list includes the decided majority of the men who were most influential in giving the Constitution its form and its spirit. Among these men were the leaders, of whose words and activities we have the fullest records.

Of these men, the seventeen whose names are italicized declared, directly or indirectly, for judicial control. Without intending to imply that the less influential members were divided on the question in the same ratio as these twenty-five, or that due respect should not be paid to the principle of simple majority rule, it is illuminating to discover how many of this dominant group are found on record in favor of the proposition that the judiciary would in the natural course of things pass upon the constitutionality of acts of Congress. The evidence of each man's attitude is here submitted, the names being arranged, as above, in their alphabetical order.

John Blair, of Virginia, was a member of the Virginia court

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of appeals which decided the case of Commonwealth *v.* Caton,[1] in 1782, and he agreed with the rest of the judges "that the court had power to declare any resolution or act of the legislature, or of either branch of it, to be unconstitutional and void."[2] Ten years later he was one of the three judges of the federal circuit court for the district of Pennsylvania who claimed that they could not perform certain duties imposed upon them by a law of Congress, because the duties were not judicial in nature and because under the law their acts would be subject to legislative or executive control. These judges—Blair, Wilson[3] and Peters—joined in a respectful letter of protest to President Washington, April 18, 1792, in which they declared that they held it to be their duty to disregard the directions of Congress rather than to act contrary to a constitutional principle.[4] It may also be noted that, as a member of the federal Senate, Blair supported the Judiciary Act of 1789, which accorded to the Supreme Court the power to review and reverse or affirm the decisions of state courts denying the validity of federal statutes.[5]

John Dickinson, of Delaware, is usually placed among the members of the Convention who did not recognize the power of the courts to pass upon the constitutionality of statutes; for in the debate on August 15, just after Mercer[6] declared against judicial control, Dickinson said that "he was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute."[7] Later, however, he accepted the principle of judicial control, either because he thought it sound or because

[1] Thayer's Cases in Constitutional Law, vol. i, p. 55.

[2] That the decision could have been reached without invoking this power, as Mr. Boudin argues, *loc. cit.*, p. 245, note 1, does not affect the value of the decision as evidence of Blair's belief in the existence of the power.

[3] Wilson, as we shall see later, had taken a strong stand, both in the constituent Convention and in the ratifying Pennsylvania convention, in favor of judicial control of legislation. *Cf. infra*, pp. 14, 26.

[4] Hayburn's Case, 2 Dallas, 409.

[5] *Cf. infra*, p. 15.

[6] *Cf. infra*, p. 20.

[7] Farrand, vol. ii, p. 299.

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he could find no satisfactory substitute. In one of his "Fabius" letters, written in advocacy of the Constitution in 1788, he says:

> In the senate the sovereignties of the several states will be equally represented; in the house of representatives the people of the whole union will be equally represented; and in the president and the federal independent judges, so much concerned in the execution of the laws and in the determination of their constitutionality, the sovereignties of the several states and the people of the whole union may be considered as conjointly represented.[1]

Whatever his personal preference may have been, he evidently understood that the new instrument implicitly empowered the federal judiciary to determine the constitutionality of laws; and he presents this implication to the public as a commendable feature of the Constitution.

Oliver Ellsworth, of Connecticut, held that the federal judiciary, in the discharge of its normal functions, would declare acts of Congress contrary to the federal Constitution null and void. In the Connecticut convention, called to ratify the federal Constitution, he was careful to explain this clearly to the assembled delegates.[2] Later, he was chairman of the Senate committee which prepared the Judiciary Act of 1789 and took a leading part in the drafting of that measure.[3]

Elbridge Gerry, of Massachusetts. When, on June 4, the proposition relative to a council of revision was taken into consideration by the Convention, Gerry expressed doubts

> whether the Judiciary ought to form a part of it, as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality. In some States the Judges had actually set aside laws as being against the Constitution. This was done, too, with general approbation. It was quite foreign from the nature of the office to make them judges of the policy of public measures.[4]

During the debate in the first Congress on the question

[1] Ford, Pamphlets on the Constitution of the United States, p. 184.

[2] *Cf. infra*, p. 27.

[3] *Cf. infra*, p. 15.

[4] Farrand, vol. i, p. 97.

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whether the president had the constitutional right to remove federal officers without the consent of the Senate, Gerry more than once urged that the judiciary was the proper body to decide the issue finally. On June 16, 1789, he said:

Are we afraid that the President and Senate are not sufficiently informed to know their respective duties? . . . . If the fact is, as we seem to suspect, that they do not understand the Constitution, let it go before the proper tribunal; the judges are the constitutional umpires on such questions.[1]

Speaking on the same subject again, he said:

If the power of making declaratory acts really vests in Congress and the judges are bound by our decisions, we may alter that part of the Constitution which is secured from being amended by the fifth article; we may say that the ninth section of the Constitution, respecting the migration or importation of persons, does not extend to negroes; that the word persons means only white men and women. We then proceed to lay a duty of twenty or thirty dollars per head on the importation of negroes. The merchant does not construe the Constitution in the manner that we have done. He therefore institutes a suit and brings it before the supreme judicature of the United States for trial. The judges, who are bound by oath to support the Constitution, declare against this law; they would therefore give judgment in favor of the merchant.[2]

Alexander Hamilton, of New York. In *The Federalist*, written in defence of the Constitution, and designed to make that instrument acceptable to the electorate, Hamilton said:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be, regarded by the judges as a fundamental law. It must, therefore, belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred, or in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.[3]

[1] Annals of Congress, vol. i, p. 491. See also p. 596.

[2] Elliot's Debates, vol. iv, p. 393.

[3] The Federalist, no. 78.

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Rufus King, of Massachusetts. In the discussion of the proposed council of revision which took place in the Convention on June 4, King took the same position as Gerry, observing "that the judges ought to be able to expound the law as it should come before them free from the bias of having participated in its formation.[1]" According to Pierce's notes he said that he

was of opinion that the judicial ought not to join in the negative of a law because the judges will have the expounding of those laws when they come before them; and they will no doubt stop the operation of such as shall appear repugnant to the constitution.[2]

James Madison, of Virginia. That Madison believed in judicial control over legislation is unquestionable, but as to the exact nature and extent of that control he was in no little confusion. His fear of the legislature is expressed repeatedly in his writings, and he was foremost among the men who sought to establish a revisionary council of which the judges should form a a part. In the Convention he said:

Experience in all the states had evinced a powerful tendency in the legislature to absorb all power into its vortex. This was the real source of danger to the American constitutions; and suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles.[3]

The association of the judges with the executive, he contended, "would be useful to the judiciary department by giving it an additional opportunity of defending itself against legislative encroachments."[4] He was evidently greatly disappointed by the refusal of the Convention to establish a revisionary council; for, in after years, he said that "such a control, restricted to constitutional points, besides giving greater stability and system to the rules of expounding the instrument would have precluded the question of a judiciary annulment of legislative acts.[5]

From the first, however he accepted judicial control only with limitations; and complete judicial paramountcy over the other

[1] Farrand, vol. i, p. 98.
[2] *Ibid.*, p. 109.
[3] *Ibid.*, vol. ii, p. 74.
[4] *Ibid.*
[5] Writings of James Madison, vol. viii, p. 406.

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branches of the federal government he certainly deprecated. When it was proposed to extend the jurisdiction of the Supreme Court to cases arising under the Constitution as well as under the laws of the United States, he

doubted whether it was not going too far to extend the jurisdiction of the court generally to cases arising under the Constitution and whether it ought not to be limited to cases of a judiciary nature. The right of expounding the constitution in cases not of this nature ought not to be given to that department.[1]

The refusal of the Convention to establish a council of revision, in his opinion, left the judiciary paramount, which was in itself undesirable and not intended by the framers of the Constitution. In a comment on the proposed Virginia constitution of 1788, he wrote, in that year:

In the state constitutions and indeed in the federal one also, no provision is made for the case of a disagreement in expounding them [the laws], and as the courts are generally the last in making the decision, it results to them, by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper.[2]

The right of the courts to pass upon constitutional questions in cases of a judicial nature he fully acknowledged; but this did not, in his mind, preclude the other departments from declaring their sentiments on points of constitutionality and from marking out the limits of their own powers. This view he expressed in the House of Representatives (first Congress) when the question of the president's removing power was under debate:

The great objection . . . is that the legislature itself has no right to expound the Constitution; that wherever its meaning is doubtful, you must leave it to take its course, until the judiciary is called upon to declare its meaning. I acknowledge, in the ordinary course of government, that the exposition of the laws and Constitution devolves upon the judicial; but I beg to know upon what principle it can be contended

[1] Farrand, vol. ii, p. 430.

[2] Writings, vol. v, pp. 293, 294.

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that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments. The Constitution is the charter of the people in the government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the constitutional boundary of either be brought into question I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.

Perhaps this is an admitted case. There is not one government on the face of the earth, so far as I recollect—there is not one in the United States—in which provision is made for a particular authority to determine the limits of the constitutional division of power between the branches of the government. In all systems, there are points which must be adjusted by the departments themselves, to which no one of them is competent. If it cannot be determined in this way, there is no resource left but the will of the community, to be collected in some mode to be provided by the Constitution, or one dictated by the necessity of the case. It is, therefore, a fair question, whether this great point may not as well be decided, at least by the whole legislature, as by part—by us, as well as by the executive or the judicial. As I think it will be equally constitutional, I cannot imagine it will be less safe, that the exposition should issue from the legislative authority, than any other; and the more so, because it involves in the decision the opinions of both of those departments whose powers are supposed to be affected by it. Besides, I do not see in what way this question could come before the judges to obtain a fair and solemn decision; but even if it were the case that it could, I should suppose, at least while the government is not lead by passion, disturbed by faction, or deceived by any discolored medium of sight, but while there is a desire in all to see and be guided by the benignant ray of truth, that the decision may be made with the most advantage by the legislature itself.[1]

Madison's views on the point may be summed up as follows: In cases of a political nature involving controversies between departments, each department enjoys a power of interpretation for itself (a doctrine which Marshall would not have denied); in controversies of a judicial nature arising under the Constitution, the Supreme Court is the tribunal of last resort; in cases of federal statutes which are held to be invalid by nullifying

[1] Elliott's Debates, vol. iv, pp. 382, 383.

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states, the Supreme Court possesses the power to pass finally upon constitutionality.[1]

Luther Martin, of Maryland, although he opposed the proposition to form a revisionary council by associating judges with the executive, was nevertheless strongly convinced that unconstitutional laws would be set aside by the judiciary. During the debate on July 21, he said:

A knowledge of mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature. And as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative. It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating against popular measures of the Legislature.[2]

George Mason, of Virginia, favored associating the judges with the executive in revising laws. He recognized that the judges would have the power to declare unconstitutional statutes void, but he regarded this control as insufficient. He said:

Notwithstanding the precautions taken in the constitution of the Legislature, it would so much resemble that of the individual states, that it must be expected frequently to pass unjust and pernicious laws. This restraining power was therefore essentially necessary. It would have the effect not only of hindering the final passage of such laws, but would discourage demagogues from attempting to get them passed. It had been said (by Mr. L. Martin) that if the Judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of Judges they would have one negative. He would reply that in this capacity they could impede in one case only, the operation of laws. They could declare an unconstitutional law void. But with regard to every law, however unjust, oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course. He

[1] *Cf.* Madison's letter of August, 1830, to Everett; Writings, vol. ix, p. 383.

[2] Farrand, vol. ii, p. 76. For further evidence of Martin's attitude, *cf. infra*, p. 26.

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wished the further use to be made of the Judges, of giving aid in preventing every improper law. Their aid will be the more valuable as they are in the habit and practice of considering laws in their true principles, and in all their consequences.[1]

Gouverneur Morris, of Pennsylvania, declared, in the debate on July 21, that some check on the legislature was necessary; and he "concurred in thinking the public liberty in greater danger from legislative usurpations than from any other source."[2] He was apprehensive lest the addition of the judiciary to the executive in the council of revision would not be enough to hold the legislature in check. Later, when Dickinson questioned the right of the judiciary to set aside laws, Morris said:

> He could not agree that the judiciary, which was a part of the executive, should be bound to say that a direct violation of the Constitution was law. A control over the legislature might have its inconveniences. But view the danger on the other side. . . . Encroachments of the popular branch of the government ought to be guarded against.[3]

This view he later confirmed in the debate on the repeal of the Judiciary Act of 1801, when he said:

> It has been said, and truly too, that governments are made to provide against the follies and vices of men. . . . Hence checks are required in the distribution of the power among those who are to exercise it for the benefit of the people. Did the people of America vest all power in the Legislature? No; they had vested in the judges a check intended to be efficient—a check of the first necessity, to prevent an invasion of the Constitution by unconstitutional laws—a check which might prevent any faction from intimidating or annihilating the tribunals themselves.[4]

Edmund Randolph, of Virginia, does not seem to have expressed himself in the Convention on the subject of judicial control over congressional legislation. In the plan which he presented, however, provision was made for establishing a council of revision, composed of the executive and a conveni-

[1] Farrand, vol. ii, p. 78. [2] *Ibid.* pp. 75 *et seq.* [3] *Ibid.* p. 299.
[4] Benton, Abridgement of Debates in Congress, vol. ii, p. 550.

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ent number of the judiciary, "with authority to examine every act of the National Legislature before it shall operate." He must, therefore, have been convinced of the desirability of some efficient control over the legislative department. Subsequently, as attorney-general, when it became his duty to represent the government in Hayburn's case[1] and he was moving for a *mandamus* to compel the circuit court for the district of Pennsylvania to execute a law under which the judges had declined to act on the ground of its unconstitutionality, Randolph accepted the view of the judges that they were not constitutionally bound to enforce a law which they deemed beyond the powers of Congress. The meager abstract of his argument before the Supreme Court in Dallas's *Reports* gives no hint of its precise character; but in a letter to Madison, dated August 12, 1792, Randolph said: "The sum of my argument was an admission of the power to refuse to execute, but the unfitness of the occasion."[2] That he approved the provision of the Judiciary Act of 1789, giving the Supreme Court appellate jurisdiction to review and reverse or affirm a decision of a state court denying the constitutionality of a federal statute, is apparent from his report to Congress on the judicial system in 1790. After enumerating the instances in which cases might be carried up to the Supreme Court from the state courts, he says: "That the avenue to the federal courts ought, in these instances, to be unobstructed, is manifest." The only question with which he was concerned was: "In what stage and by what form shall their interposition be prayed?"[3]

Hugh Williamson, of North Carolina, certainly believed in judicial control over federal legislation; for in the debate on the proposition to insert a clause forbidding Congress to pass *ex post facto* laws, he said: "Such a prohibitory clause is in the constitution of North Carolina, and though it has been violated, it has done good there and may do good here, because the judges can take hold of it."[4] It is obvious that the only way

[1] 2 Dallas, 409.

[2] Moncure Conway, Edmund Randolph, p. 145.

[3] American State Papers, Class X, Miscellaneous, vol. i, p. 23.

[4] Farrand, vol. ii, p. 376.

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in which the judges can "take hold of" *ex post facto* laws is by declaring them void.

James Wilson, of Pennsylvania, expressed himself in favor of judicial control in the course of the debate on July 21, when the proposition to associate the national judiciary with the executive in the revisionary power was again being considered. He declared:

> The Judiciary ought to have an opportunity of remonstrating against projected encroachments on the people as well as on themselves. It had been said that the Judges as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions, the improper views of the Legislature.[1]

Speaking again, on August 23, in favor of giving the national legislature a negative over state legislation, he said that he

> considered this as the key-stone wanted to complete the wide arch of Government we are raising. The power of self-defence had been urged as necessary for the State Governments. It was equally necessary for the General Government. The firmness of Judges is not of itself sufficient. Something further is requisite. It will be better to prevent the passage of an improper law than to declare it void when passed.[2]

The rejection of the plan to establish a revisionary council did not lead Wilson to infer that thereby the right of the court to pass upon the constitutionality of statutes was denied. On the contrary, in the debates in the Pennsylvania ratifying convention, he declared that the proposed Constitution empowered the judges to declare unconstitutional enactments of Congress null and void.[3]

[1] Farrand, vol. ii, p. 73.

[2] *Ibid.* p. 391.

[3] *Cf. infra*, p. 26.

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Examination of the speeches, papers and documents of the influential members of the Convention enumerated above fails to disclose any further direct declarations in favor of the principle of judicial review of legislation. However, there is reasonably satisfactory evidence that four other members of this group understood and indorsed the doctrine.

William Johnson, of Connecticut, *Robert Morris*, of Pennsylvania, *William Paterson*, of New Jersey, and *George Washington*. The evidence of their opinions is their approval of the Judiciary Act of 1789. Section 25 of that act provided:

> A final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; . . . or where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission,—may be reëxamined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.

In other words: the Supreme Court may review and affirm a decision of a state court holding unconstitutional a statute of the United States. It surely is not unreasonable to assume that the men who established this rule believed that the Supreme Court could declare acts of Congress unconstitutional independently of decisions in lower state courts. Indeed, it would seem absurd to assume that an act of Congress might be annulled by a state court with the approval of the Supreme Court, but not by the Supreme Court directly.

William Johnson, Robert Morris and William Paterson[1] were members of the first Senate and voted in favor of the Judiciary Act[2]; and Washington, as president, approved the measure.

In addition to these eminent members of the Convention who directly or indirectly supported the doctrine of judicial control

[1] Annals of Congress, vol. i, p. 51.

[2] For further evidence in the case of Paterson *cf. infra*, p. 33.

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over legislation there were several members of minor influence who seem to have understood and approved it. There is direct or indirect evidence in the following cases.

Abraham Baldwin, of Georgia, had no extensive faith in the probity of a legislature based on a widely extended suffrage. In speaking on the composition of the Senate, on June 29, he said: "He thought the second branch ought to be the representation of property, and that in forming it, therefore, some reference ought to be had to the relative wealth of their constituents and to the principles on which the Senate of Massachusetts was constituted."[1] Baldwin does not seem to have spoken on the subject of the judicial control in the Convention; but two years later, on June 19, 1789, he participated in the discussion of the bill constituting the Department of Foreign Affairs. The point at issue was whether the president could remove alone or only with the consent of the Senate; and some members of the House of Representatives held that this was a judicial question. To this Baldwin replied:

> Gentlemen say it properly belongs to the Judiciary to decide this question. Be it so. It is their province to decide upon our laws and if they find this clause to be unconstitutional, they will not hesitate to declare it so; and it seems to be a very difficult point to bring before them in any other way. Let gentlemen consider themselves in the tribunal of justice called upon to decide this question on a *mandamus*. What a situation! almost too great for human nature to bear, they would feel great relief in having had the question decided by the representatives of the people. Hence, I conclude, they also will receive our opinion kindly.[2]

Here is a direct statement that it is the duty of the judges to pass upon the constitutionality of statutes; and the statute in question was not one involving an encroachment upon the sphere of the judiciary but one touching the respective powers of the president and Senate. Baldwin here seems to think, however, that the court would, and ought to, receive with gratitude the expressed opinion of the House of Representatives.

[1] Farrand, vol. i, p. 469.

[2] Annals of Congress, vol. i. p. 582.

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Such an opinion, he apparently thought, would aid the judges in reaching a decision but would not be binding upon them. In his later years, however, after the struggle between the Federalists and the Jeffersonians for the control of the national government had begun, Baldwin seems to have retracted his earlier view; for in a debate in the Senate concerning the powers of the presidential electors, in January, 1800, he said:

> Suppose either of the other branches of the government, the Executive or the Judiciary or even Congress, should be guilty of taking steps which are unconstitutional, to whom is it submitted or who has control over it, except by impeachment? The Constitution seems to have equal confidence in all the branches on their own proper ground, and for either to arrogate superiority, or a claim to greater confidence, shows them in particular to be unworthy of it, as it is in itself directly unconstitutional.[1]

It is small wonder that Baldwin thought the powers of the judiciary one of the questions that the Convention had left unsettled;[2] but his clear statement on June 19, 1789, may reasonably be taken to represent his understanding of the power conferred on the judiciary by the Constitution. At that time, at least, he believed it a function of the judiciary to pass upon the constitutionality of the statutes.

Richard Bassett, of Delaware, was a member of the Senate committee which introduced the Judiciary Act of 1789, and he voted for the measure.[3] Bassett was also one of Adams's Federalist judges, appointed under the act of February 13, 1801; and when the Jeffersonians repealed the law he joined several of his colleagues in a protest against the repeal, on the ground that it was an impairment of the rights secured to them as judicial officers under the Constitution. In a memorial to Congress the deposed judges declared that they were

> compelled to represent it as their opinion that the rights secured to them by the Constitution, as members of the judicial department, have been impaired. . . . The right of the undersigned to their compensa-

[1] Farrand, vol. iii, p. 383.

[2] *Ibid.* p. 370. *Cf. infra*, pp. 23, 24.

[3] Annals of Congress, vol. i, pp. 18, 51.

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tion. . . involving a personal interest, will cheerfully be submitted to judicial examination and decision, in such manner as the wisdom and impartiality of Congress may prescribe.[1]

The memorialists proposed that their rights should be decided by the judicial department; and such a decision would have involved an inquiry regarding the constitutionality of the repeal of the Judiciary Act of 1801.[2] That Bassett believed the repeal unconstitutional, as to his deprivation of judicial functions and salary, and held the judiciary to be the proper authority for deciding the point, is quite evident.

George Wythe, of Virginia, was a member of the Virginia court of appeals which decided the case of Commonwealth *v.* Caton[3] in 1782. Justice Wythe, in his opinion, referred to the practice of certain English chancellors, who had defended the rights of subjects against the rapacity of the crown, and exclaimed:

If the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal; and, pointing to the constitution, will say to them, here is the limit of your authority and hither shall you go but no further.

The duty of a court to declare unconstitutional laws void could hardly be more energetically asserted. Of course this is not direct evidence that Wythe held that the federal Constitution embodied the principle, but it is clear that he favored the doctrine.

William Few, of Georgia, *George Read*, of Delaware, and *Caleb Strong*, of Massachusetts, who were members of the first Senate under the new government, voted for the Judiciary Act[4] and may therefore, for the reasons indicated above, be regarded

[1] American State Papers, Class X, Miscellaneous, vol. i, p. 340.

[2] A proposition to make provision for submitting the case to judicial determination was defeated in the House on January 27, 1803. Annals of Congress, Second Session, 7th Congress, p. 439.

[3] Thayer's Cases, vol. i, p. 55. *Cf. supra*, p. 5.

[4] Annals of Congress, vol. i, p. 51. *Cf. supra*, p. 15.

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as having accepted the principle of the judicial review of federal statutes.

Summing up the evidence: we may say that of the leading members of the Convention no less than thirteen believed that the judicial power included the right and duty of passing upon the constitutionality of acts of Congress. Satisfactory evidence is afforded by the vote on the Judiciary Act that four other leading members held to the same belief. Of the less prominent members, we find that three expressed themselves in favor of judicial control and three others approved it by their vote on the Judiciary Act. We are accordingly justified in asserting that twenty-three members of the Convention favored or at least accepted some form of judicial control. That they all had equal understanding of the implications of the doctrine, that they clearly foresaw the possible development of the judicial power, cannot, of course, be claimed. But it seems to be unquestionable that they all understood that refusal to recognize unconstitutional enactments was a part of the judicial function.

II

We may now turn to the evidence that judicial control was not regarded by the framers of the Constitution as a normal judicial function under the new Constitution. The researches of those who contend that the doctrine propounded in Marbury *v.* Madison is sheer usurpation have placed only four members of the Convention on record against judicial control; and one of these, John Dickinson, of Delaware, must be stricken from the list.[1] The evidence in the case of the remaining three members is as follows:

Gunning Bedford, of Delaware, speaking in the Convention on June 4 on the subject of the executive veto, expressed himself as

> opposed to every check on the legislative, even the council of revision first proposed. He thought it would be sufficient to mark out in the Constitution the boundaries to the legislative authority, which would give all the requisite security to the rights of the other departments.

[1] *Cf. supra*, pp. 5, 6.

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The representatives of the people were the best judges of what was for their interest and ought to be under no external controul whatever. The two branches would produce a sufficient controul within the legislature itself.[1]

John F. Mercer, of Maryland. On August 15 Madison moved that all acts, before they became laws, should be submitted to both the executive and supreme judiciary departments and, upon being vetoed by either or both of these departments, be repassed only by extraordinary majorities. Mercer

heartily approved the motion. It is an axiom that the judiciary ought to be separate from the legislative; but equally so that it ought to be independent of that department. The true policy of the axiom is that legislative usurpation and oppression may be obviated. He disapproved of the doctrine that the judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made and then to be uncontroulable.

Mercer evidently feared "legislative oppression," and when the motion to have acts submitted to the judiciary before they should become laws was rejected, he may have changed his mind on the subject of judicial control. However that may be, he stands on record as distinctly disapproving the doctrine.

Richard Spaight, of North Carolina, was undoubtedly opposed to judicial control over legislation, although he does not appear to have said anything on the subject in the constitutional Convention. In the spring of 1787 the superior court of North Carolina, in the case of Bayard *v.* Singleton, declared an act of the legislature of that state null and void on the ground that it was not warranted by the constitution of the commonwealth. The decision aroused much popular opposition and Spaight joined in the protest against the action of the court. In a letter dated Philadelphia, August 12, 1787, and directed to Mr. Iredell, Spaight wrote:

I do not pretend to vindicate the law which has been the subject of controversy; it is immaterial what law they have declared void; it is their usurpation of the authority to do it that I complain of, as I do

[1] Farrand, vol. i, p. 100.

[2] *Ibid.* vol. ii, p. 298.

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most positively deny that they have any such power; nor can they find anything in the constitution, either directly or impliedly, that will support them, or give them any color of right to exercise that authority. Besides it would have been absurd, and contrary to the practice of all the world, had the constitution vested such power in them, as would have operated as an absolute negative on the proceedings of the legislature, which no judiciary ought ever to possess. . . .

He further declared that "many instances might be brought to show the absurdity and impropriety of such power being lodged in the judges." He was aware, he explained, of the desirability of a check on the legislature, but he thought an annual election the best that could be devised.[1]

Pierce Butler, of South Carolina, and *John Langdon*, of New Hampshire, were members of the first Senate of the new Union, and both voted against the Judiciary Act of 1789.[2] Their reasons for so voting are not apparent; and it may be questioned whether a vote cast against the act as a whole is evidence of opposition to the principle of judicial control of federal legislation recognized in the twenty-fifth section of the act. If, however, these two names be added, the list of opponents of judicial control contain five members of the Convention, and but one of the five, Butler, belonged to the influential group.

III

Mr. Boudin lays much stress on the silence of those who disliked judicial control of legislation. He says:

It is absurd to assume that the many avowed opponents of judicial control of legislation who sat in the convention would have agreed to the [judiciary] article without a murmur had they suspected that it contained even a part of the enormous power which our judiciary now exercises. Richard Spaight for one, whose fiery denunciation of this power I have quoted above, would have made the halls in which the Convention met ring to the echo with his emphatic protest, had he suspected any such implications.[3]

[1] Coxe, An Essay on Judicial Power, pp. 248 *et seq.* and 385.

[2] Annals of Congress, vol. i, p. 51.

[3] *Loc. cit.* pp. 248, 249.

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The "avowed opponents" do not seem to have been "many"; but whether they and the unavowed opponents were many or few, they must have been fully aware that most of the leading members regarded the nullification of unconstitutional laws as a normal judicial function. The view was more than once clearly voiced in the Convention, and any delegate who was not aware of "such implications" must have been very remiss in the discharge of his duties. On June 4 King definitely stated that the judges in the exposition of the laws would no doubt stop the operation of such as appeared repugnant to the Constitution.[1] On that day there were present representatives from Massachusetts, Connecticut, New York, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia. In addition to members in the group of twenty-five enumerated above there were recorded as present on that occasion Bedford, McClurg, Pierce and Yates.[2] Several other members, including Spaight, were in Philadelphia at the time and were probably in attendance at that particular session, but as there was no preliminary roll call the list of those actually present must be made up from those who addressed the Convention or appeared in the roll on a divided vote. There was also a large attendance on July 21, when the doctrine of judicial control was again enunciated in even more emphatic tones. In view of these facts it cannot be assumed that the Convention was unaware that the judicial power might be held to embrace a very considerable control over legislation and that there was a high degree of probability (to say the least) that such control would be exercised in the ordinary course of events.

The accepted canons of historical criticism warrant the assumption that, when a legal proposition is before a law-making body and a considerable number of the supporters of that proposition definitely assert that it involves certain important and fundamental implications, and it is nevertheless approved by that body without any protests worthy of mention, these implications must be deemed part of that legal proposition when it becomes law; provided, of course, that they are consistent

[1] Farrand, vol. i, p. 109.

[2] *Ibid.* pp. 96 *et seq.*

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with the letter and spirit of the instrument. To go further than this—to say that the Convention must have passed definitely upon every inference that could logically be drawn from the language of the instrument that it adopted—would of course be an absurdity.

In balancing conflicting presumptions in order to reach a judgment in the case, it must be remembered that no little part of the work of drafting the Constitution was done by the Committee of Detail and the Committee of Style.

The former committee, appointed on July 24, consisted of Rutledge, Wilson, Ellsworth, Randolph and Gorham. Of these five men two, Ellsworth and Wilson, had expressly declared themselves in favor of judicial control, and Wilson seems to have been the "dominating mind of the committee." This committee had before it the resolutions referred to it by the Convention on July 23. It had also before it the Pinckney plan, or an outline of it, and the New Jersey plan. The members of the committee had been assiduous in their attendance upon the debates during the two months previous, and they prepared a draft of a constitution which they presented to the Convention on August 6. The article dealing with federal judicial power, as reported by the committee,[1] contained most of the provisions later embodied in the federal Constitution.

After lengthy debates on the draft submitted by the Committee of Detail, a committee of five was created to revise and arrange the style of the articles agreed to by the Convention; and Johnson, Hamilton, Gouverneur Morris, Madison and King were selected as members of this committee. Of these five men four, Hamilton, Morris, Madison and King, are on record as expressly favoring judicial control over legislation. There is some little dispute as to the share of glory to be assigned to single members of the committee, but undoubtedly Gouverneur Morris played a considerable part in giving to the Constitution its final form. Speaking of his work on the Constitution, Mr. Morris later wrote:

Having rejected redundant and equivocal terms, I believed it as clear

[1] Farrand, vol. ii, p. 186.

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as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject conflicting opinions had been maintained with so much professional astuteness that it became necessary to select phrases which expressing my own notions would not alarm others nor shock their self-love.[1]

That the Constitution was not designed to be perfectly explicit on all points and to embody definitely the opinions of a majority of the Convention is further evidenced by a speech made by Abraham Baldwin, a member of the Convention from Georgia, in the House of Representatives on March 14, 1796. In speaking of the clause of the Constitution which provides that treaties are to be the supreme law of the land, he said:

He would begin it by the assertion, that those few words in the Constitution on this subject were not those apt, precise, definite expressions, which irresistibly brought upon them the meaning which he had been above considering. He said it was not to disparage the instrument, to say that it had not definitely, and with precision, absolutely settled everything on which it had spoken. He had sufficient evidence to satisfy his own mind that it was not supposed by the makers of it at the time but that some subjects were left a little ambiguous and uncertain. It was a great thing to get so many difficult subjects definitely settled at once. If they could all be agreed in, it would compact the Government. The few that were left a little unsettled might, without any great risk, be settled by practice or by amendments in the progress of the Government. He believed this subject of the rival powers of legislation and treaty was one of them; the subject of the militia was another, and some question respecting the judiciary another. When he reflected on the immense difficulties and dangers of that trying occasion—the old Government prostrated, and a chance whether a new one could be agreed in—the recollection recalled to him nothing but the most joyful sensations that so many things had been so well settled, and that experience had shown there was very little difficulty or danger in settling the rest.[2]

IV

It is urged by the opponents of judicial control that, whatever may have been the purpose of the members of the Phila-

[1] Sparks, Life of Morris, vol. iii, p. 323.

[2] Farrand, vol. iii, p. 369.

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delphia Convention, the ratifying conventions in the states gave the final legal sanction to the Constitution, and a sound rule of interpretation would compel us to ascertain the opinion of these bodies on the point at issue. This contention cannot be gainsaid; but a full examination of the materials on the state conventions, as any one can see, would require years of research into the lives and opinions of several hundred members. The author of this paper does not pretend to have made this research, and this essay is limited principally to a consideration of the purpose of the framers, not the enactors, of the Constitution. However, it is of interest to note what materials bearing on the purpose of the enactors with regard to this point are contained in Elliott's *Debates*.

If the members of the Virginia convention which ratified the federal Constitution were in the dark in this matter, or had any doubts as to the probable implications of the judicial article, they must have been enlightened by the clear and unmistakable language of John Marshall. In replying to objections which had been raised regarding the danger of an extension of federal jurisdiction at the cost of the states, he pointed out that the proposed federal government was one of enumerated and limited powers.

> Has the government of the United States power to make laws on every subject? . . . Can they make laws affecting the mode of transferring property, or contracts, or claims between citizens of the same state? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void.[1]

In the course of the discussion Mr. Grayson said: "If the Congress cannot make a law against the Constitution I apprehend they cannot make a law to abridge it. The judges are to defend it."[2] Mr. Pendleton declared: "The fair inference is that oppressive laws will not be warranted by the Constitution, nor attempted by our representatives, who are selected for their

[1] Elliot's Debates, vol. iii, p. 553.

[2] *Ibid.* p. 567.

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ability and integrity, and that honest, independent judges will never admit an oppressive construction." [2]

The Maryland convention was by no means uninformed regarding the possible functions of the judiciary under the proposed Constitution. In his famous letter directed to the legislature of the state, Luther Martin said:

> Whether, therefore, any laws or regulations of the Congress or any act of its president or the officers are contrary to, or not warranted by, the Constitution, rests only with the judges who are appointed by Congress to determine; by whose determination every state must be bound.[2]

If the members of the Pennsylvania ratifying convention had any doubts regarding the probable exercise of judicial control over legislation under the new Constitution, these must have been removed by one of Mr. Wilson's speeches in defence of the judiciary. Some members of the convention expressed the apprehension that, inasmuch as the federal courts were to have jurisdiction in all cases in law and equity arising under the Constitution and the laws of the United States, the power enjoyed by the judges might be indefinitely extended if Congress saw fit to make laws not warranted by the Constitution. On this point Mr. Wilson said:

> I think the contrary inference true. If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void. For the power of the Constitution predominates. Anything therefore that shall be enacted by Congress contrary thereto will not have the force of law.[1]

In New York, the members of the Convention must have known the clear and cogent argument for judicial control made by Hamilton in *The Federalist*.

If the members of the Connecticut convention were unaware of the fact that under the provisions of the Constitution the judiciary would enjoy the power to pass upon the constitution-

[1] Elliot's Debates, vol. iii, p. 548. [2] *Ibid.* vol. i, p. 380.

[3] McMaster and Stone, Pennsylvania and the Federal Constitution, p. 354.

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ality of federal and state statutes, it was their own fault; for, in his speech of January 7, 1788, on the power of Congress to lay taxes, Oliver Ellsworth carefully explained the new system. He said:

> This constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void.[1]

It would be entirely misleading to conclude, from this fragmentary evidence, that the question of judicial control over acts of Congress was adequately considered in the state conventions. It was judicial control over state statutes that aroused the most serious apprehensions of critics of the new frame of government. That they thought much—or cared much—about what might happen to acts of Congress is not apparent.[2] Still it

[1] Elliot's Debates, vol. ii, p. 196. *Cf.* Farrand, vol. iii, p. 240.

[2] It is interesting to note that when, ten years later, the Kentucky and Virginia Resolutions raised the question of judicial control, and the other states had occasion to express a direct opinion on this point, none of them seems to have approved the doctrine expressed in the Resolutions. *Cf.* Ames, State Documents on Federal Relations, p. 16. The Massachusetts legislature replied to Virginia, on February 9, 1799: "This legislature are persuaded that the decision of all cases in law and equity arising under the Constitution of the United States and the construction of all laws made in pursuance thereof are exclusively vested by the people in the judicial courts of the United States." *Ibid.* pp. 18 *et seq.* The Rhode Island assembly declared that "the words, to wit, 'The judicial power shall extend to all cases arising under the laws of the United States,' vest in the federal courts exclusively, and in the Supreme Court of the United States ultimately, the authority of deciding on the constitutionality of any act or law of the Congress of the United States." *Ibid.* p. 17. The New Hampshire legislature resolved: "That the state legislatures are not the proper tribunals to determine the constitutionality of the laws of the general government; that the duty of such decision is properly and exclusively confided to the judicial department." Elliot's Debates, vol. iv, p. 539 (ed. 1861). The Vermont legislature asserted: "It belongs not to state legislatures to decide on the constitutionality of laws made by the general government, this power being exclusively vested in the judiciary courts of the Union." *Ibid.* The House of Representatives of Pennsylvania replied to Kentucky that the people of the United States "have committed to the supreme judiciary of the nation the high authority of ultimately and

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cannot be said that they were kept in the dark in this respect, or that they could not easily have learned, if the matter had interested them, what the framers of the Constitution intended and expected. And it may pertinently be asked what our constitutional position would be today, if it were recognized that each branch of the federal government, in addition to the clearly expressed powers conferred upon it, possesses those additional powers only which were understood, by the ratifying conventions of the states, to have been impliedly conferred!

V

Those who hold that it was not the intention of the framers of the Constitution to establish judicial control of legislation make much of the opposition aroused by the sporadic attempts of a few state courts to exercise such a control prior to 1787. Dean Trickett cites the cases and exclaims: "These then are the precedents!" Mr. Boudin cites them and also exclaims: "Such were the state 'precedents,' and such was the temper of the people at the time the Philadelphia Convention met to frame the Constitution of the United States." The only trouble with this line of argument is that it leaves out of account the sharp political division existing in the United States in 1787 and the following years.

The men who framed the federal Constitution were not among the paper-money advocates and stay-law makers whose operations in state legislatures and attacks upon the courts were chiefly responsible, Madison informs us, for the calling of the Convention. The framers of the Constitution were not among those who favored the assaults on vested rights which legislative majorities were making throughout the Union. On the contrary, they were, almost without exception, bitter opponents of such enterprises; and they regarded it as their chief duty, in drafting the new Constitution, to find a way of preventing the renewal of what they deemed "legislative tyranny." Examine

conclusively deciding upon the constitutionality of all legislative acts." Ames, *op. cit.* p. 20. The Senate of New York replied to Virginia and Kentucky that the decision of all cases in law and equity was confided to the federal judiciary and that the states were excluded from interference. *Ibid.* p. 23.

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the rolls of the state conventions that ratified the Constitution after it came from the Philadelphia Convention, and compare them with the rolls of the legislatures that had been assailing the rights of property. It was largely because the framers of the Constitution knew the temper and class bias of the state legislatures that they arranged that the new Constitution should be ratified by conventions. The framers and enactors of the federal Constitution represented the solid, conservative, commercial and financial interests of the country—not the interests which denounced and proscribed judges in Rhode Island, New Jersey and North Carolina, and stoned their houses in New York. The conservative interests, made desperate by the imbecilities of the Confederation and harried by state legislatures, roused themselves from their lethargy, drew together in a mighty effort to establish a government that would be strong enough to pay the national debt, regulate interstate and foreign commerce, provide for national defence, prevent fluctuations in the currency created by paper emissions and control the propensities of legislative majorities to attack private rights.

It is in the light of the political situation that existed in 1787 that we must inquire whether the principle of judicial control is out of harmony with the general purpose of the federal Constitution. It is an ancient and honorable rule of construction, laid down by Blackstone, that any instrument should be interpreted, "by considering the reason and spirit of it; or the cause which moved the legislator to enact it. . . . From this method of interpreting laws, by the reason of them, arises what we call equity." It may be, therefore, that the issue of judicial control is a case in equity. The direct intention of the framers and enactors not being clearly expressed on this point, we may have recourse to the "reason and spirit" of the Constitution.

Now the essence of the doctrine of judicial control is that the judiciary, rather than the legislative or executive department, is best fitted to pronounce the final word of interpretation on the Constitution in cases involving private rights. Assuredly it is best fitted to secure the purposes which the framers had in mind —the construction of a government strong enough to carry out certain great national functions and at the same time firm

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enough to secure the rights of persons and of property against popular majorities, no matter how great.[1]

No historical fact is more clearly established than the fact that the framers of the Constitution distrusted democracy and feared the rule of mere numbers. Almost every page of Madison's record bears witness to the fact that the Convention was anxiously seeking to solve the problem of establishing property rights on so firm a basis that they would be forever secure against the assaults of legislative majorities. If any reader needs a documented demonstration of this fact, he will do well to turn to the *Records of the Convention*, so admirably compiled by Professor Farrand. Let him go through the proceedings of the Convention and see how many of the members expressed concern at the dangers of democracy and were casting about for some method of restraining the popular branch of the government. The very system of checks and balances, which is undeniably the essential element of the Constitution, is built upon the doctrine that the popular branch of the government cannot be allowed full sway, and least of all in the enactment of laws touching the rights of property. The exclusion of the direct popular vote in the election of the president; the creation, again by indirect election, of a Senate which the framers hoped would represent the wealth and conservative interests of the country; and the establishment of an independent judiciary appointed by the president with the concurrence of the Senate—all these devices bear witness to the fact that the underlying purpose of the Constitution was not the establishment of popular government by means of parliamentary majorities.

Page after page of *The Federalist* is directed to that portion of the electorate which was disgusted with the "mutability of the public councils." Writing on the presidential veto Hamilton says:

> The propensity of the legislative department to intrude upon the rights, and absorb the powers, of the other departments has already been suggested and repeated. . . . It may perhaps be said that the power of preventing bad laws included the power of preventing good ones; and

[1] The Federalist, no. 10.

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may be used to the one purpose as well as the other. But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws which form the greatest blemish in the character and genius of our governments. They will consider every institution calculated to restrain the excess of law-making and to keep things in the same state in which they happen to be at any given period, as more likely to do good than harm; because it is favorable to greater stability in the system of legislation. The injury which may be possibly done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.[1]

In the face of the evidence above adduced, in the face of the political doctrines enunciated time and again on divers occasions by the leaders in the Convention, it certainly is incumbent upon those who say that judicial control was not within the purpose of the men who framed and enacted the federal Constitution to bring forward positive evidence, not arguments resting upon silence. It is incumbent upon them to show that the American federal system was not designed primarily to commit the established rights of property to the guardianship of a judiciary removed from direct contact with popular electorates.[2] Whether this system is outworn, whether it has unduly exalted property rights, is a legitimate matter for debate; but those who hold the affirmative cannot rest their case on the intent of the eighteenth-century statesmen who framed the Constitution.

VI

The great justice who made the theory of judicial control operative had better opportunities than any student of history or law today to discover the intention of the framers of the federal Constitution. Marshall, to be sure, did not have before him Elliot's *Debates*, but he was of the generation that made the Constitution. He had been a soldier in the Revolutionary War. He had been a member of the Virginia convention that ratified the Constitution; and he must have remembered stating

[1] The Federalist, no. 73.

[2] See the article on this point by President Arthur T. Hadley, of Yale University. *The Independent*, April 16, 1908.

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in that convention the doctrine of judicial control,[1] apparently without arousing any protest. He was on intimate, if not always friendly, relations with the great men of his state who were instrumental in framing the Constitution. Washington once offered him the attorney-generalship. He was an envoy to France with two members of the Convention, Charles Cotesworth Pinckney and Elbridge Gerry. He was a member of Congress for part of one term in Adams's administration; he was secretary of state under Adams; and he was everywhere regarded as a tower of strength to the Federalists. It was, therefore, no closet philosopher, ignorant of the conditions under which the Constitution was established and unlearned in the reason and spirit of that instrument, who first enunciated from the supreme bench in unmistakable language the doctrine that judicial control over legislation was implied in the provisions of the federal Constitution.[2]

Those who hold that the framers of the Constitution did not intend to establish judicial control over federal legislation sometimes assert that Marshall made the doctrine out of whole cloth and had no precedents or authority to guide him. This is misleading. It is true that it was Marshall who first formally declared an act of Congress unconstitutional; but the fact should

[1] *Cf. supra*, p. 25. In Marshall's argument in the case of Ware *v.* Hylton before the Supreme Court in 1796, Marshall said: "The legislative authority of any country can only be restrained by its own municipal constitution. This is a principle that springs from the very nature of society; and the judicial authority can have no right to question the validity of a law unless such a jurisdiction is expressly given by the Constitution." 3 Dallas, 211. Here, however, Marshall was arguing as counsel, not stating his own personal views.

[2] It has not escaped close observers, that the law which Marshall declared unconstitutional in Marbury *v.* Madison was a part of the Judiciary Act of 1789, which had been drafted and carried through by men who had served in the Convention. An analysis of the decision shows, however, that the section set aside was at most badly drawn and was not in direct conflict with the Constitution. Had Marshall been so inclined he might have construed the language of the act in such a manner as to have escaped the necessity of declaring it unconstitutional. *The Nation*, vol. lxxii, p. 104. The opportunity for asserting the doctrine, however, was too good to be lost, and Marshall was astute enough to take advantage of it. In view of the recent Jeffersonian triumph, he might very well have felt the need of having the great precedent firmly set.

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not be overlooked that in the case of Hylton *v.* The United States[1] the Supreme Court, with Ellsworth [2] as chief justice and Paterson as associate (both members of the Convention), exercised the right to pass upon the constitutionality of an act of Congress imposing a duty on carriages. On behalf of the appellant in this case it was argued that the law was unconstitutional and void in so far as it imposed a direct tax without apportionment among the states. The court sustained the statute. If it was not understood that the court had the power to hold acts of Congress void on constitutional grounds, why was the case carried before it? If the court believed that it did not have the power to declare the act void as well as the power to sustain it, why did it assume jurisdiction at all or take the trouble to consider and render an opinion on the constitutionality of the tax?

The doctrine of judicial control was a familiar one in legal circles throughout the period between the formation of the Constitution and the year 1803, when Marshall decided the Marbury case. In Hayburn's case, already cited, the federal judges had refused to execute a statute which they held to be unconstitutional. This was in 1792. In 1794, in the case of Glass *v.* The Sloop Betsey,[3] the Supreme Court heard the doctrine of judicial control laid down by the counsel of the appellants:

> The well-being of the whole depends upon keeping each department within its limits. In the state governments several instances have occurred where a legislative act has been rendered inoperative by a judicial decision that it was unconstitutional; and even under the federal government the judges, for the same reason, have refused to execute an act of Congress. . . . To the judicial and not to the executive department, the citizen or subject naturally looks for determinations upon his property; and that agreeably to known rules and settled forms, to which no other security is equal.

In the case of Calder *v.* Bull,[4] decided in 1798, the counsel for the plaintiffs in error argued "that any law of the federal

[1] 3 Dallas, 171 (1796).

[2] Ellsworth did not take part in the decision, for he had just been sworn into office.

[3] 3 Dallas, 13.

[4] 3 Dallas, 386.

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government or of any of the state governments contrary to the Constitution of the United States is void; and that this court possesses the power to declare such law void." Justice Chase however refused to pass upon the general principle, because it was not necessary to the decision of the case before him. He said:

> Without giving an opinion at this time whether this court has jurisdiction to decide that any law made by Congress is void, I am fully satisfied that this court has no jurisdiction to determine that any law of any state legislature contrary to the constitution of such state is void.[1]

In the same case Justice Iredell said:

> If any act of Congress or of the legislature of a state violates those constitutional provisions, it is unquestionably void; though I admit, that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority but in a clear and urgent case.

In view of the principles entertained by the leading members of the Convention with whom Marshall was acquainted, in view of the doctrine so clearly laid down in number 78 of *The Federalist*, in view of the arguments made more than once by eminent counsel before the Supreme Court, in view of Hayburn's case and Hylton *v.* The United States, in view of the judicial opinions several times expressed, in view of the purpose and spirit of the federal Constitution, it is difficult to understand the temerity of those who speak of the power asserted by Marshall in Marbury *v.* Madison as "usurpation."

CHARLES A. BEARD.

[1] Of course, as everybody knows, Chase adhered stoutly to the doctrine of federal judicial control.

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Note on the views of Thomas Jefferson

The great authority of Jefferson is often used by the opponents of judicial control; and it is true that, after his party was in control of the legislative and executive branches of the government, he frequently attacked judicial "usurpation" with great vehemence. The Federalists were in possession of the Supreme Court for some time after his inauguration. Jefferson was not a member of the Convention that drafted the Constitution nor of the Virginia convention that ratified it. There is, however, absolutely no question that at the time the Constitution was formed he favored some kind of direct judicial control. In a letter to Madison, dated Paris, December 20, 1787, he said: "I like the organization of the government into Legislative, Judiciary and Executive. . . . And I like the negative given to the Executive with a third of either house, though I should have liked it better had the judiciary been associated for that purpose, or invested with a similar and separate power."[1] He had before him, of course, only a copy of the new instrument and the explanatory letters from his friends. In another letter from Paris, to F. Hopkinson, he approved the idea of a council of revision and added "What I disapproved from the first moment also was the want of a bill of rights to guard liberty against the legislative as well as executive branches of the government ["by" stricken out in the manuscript—it would be interesting to know whether he had in mind "the judiciary"], that is to say, to secure freedom in religion, freedom of the press, freedom from monopolies, *etc.*"[2] Jefferson favored a bill of rights because of "the legal check which it puts into the hands of the judiciary."[3]

[1] Documentary History of the Constitution, part i, p. 412.

[2] *Ibid.* vol. v, p. 159.

[3] *Ibid.* vol. v, p. 161.

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THE "LEVY ELECTION LAW" OF 1911 IN NEW YORK

THE chief feature of the so-called "Levy Election Law," [1] adopted by the New York legislature in 1911, was its attempt, by jockeying the form of the party-column ballot, to throw obstacles in the way of the independent voter and to make effective fusion between minority parties and independent political groups practically impossible. The unanimous decision of the Court of Appeals in the Matter of Hopper,[2] rendered October 10, 1911, holding the ballot provisions of this law unconstitutional, is a notable triumph of the democratic principle over the oligarchic interests of a political machine.

In order fully to understand the character of this legislation and the scope and significance of the decision, the student of electoral methods should know something of previous efforts toward the same end on the part of dominant political machines in other states, and of the attitude which the courts in those jurisdictions have taken with respect to such efforts.

Michigan, in 1895, Ohio, in 1896, and Wisconsin, in 1897, passed statutes providing, in conjunction with the party-column form of ballot, that the name of no candidate should appear upon the ballot in more than one place. The Michigan and Ohio statutes further provided that, in case any candidate should receive a nomination from more than one party, he must elect in which ticket on the ballot his name should appear. In Wisconsin his name was to appear in the ticket of the party first nominating him. In any one of these three states, accordingly, the candidate might take or leave either nomination, but could not enjoy the practical advantages of both. The necessary result of such a limitation, where the party-column type of ballot is in use, as it was (and still is) in the three states named, is to hamper fusion between parties upon candidates, and to prevent the offering of eclectic tickets by municipal parties or independent political bodies. Other restrictions that result

[1] Laws 1911, ch. 649.

[2] 203 N. Y. 144.

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from such a rule will be mentioned later, when the New York variant of this scheme is examined. In spite of attack upon these provisions they were held valid by the courts in each of the three states.[1] The decisions upholding these statutes were rendered in 1895, 1896 and 1898 respectively, *i. e.* immediately after their enactment and before their practical effect had been tested. It should be set down to the credit of Ohio that this vicious provision has since been repealed, but it is still operative in the two other states.

In 1899 California adopted a similar statute; and in 1902—some years, it will be noticed, after the other cases had been decided, and therefore at a time when it had become possible to determine the practical effects of the provisions in question—the same question was presented to the Supreme Court of California. After a very careful consideration of the Michigan, Ohio and Wisconsin cases, the California court, dividing four judges to three, came to the opposite conclusion and declared such a provision unconstitutional.[2] The majority of the judges attached considerable weight to the argument that, in the column on the ballot from which a candidate's name was excluded by operation of the above rule, the California statute required the words "no nomination" to appear under the title of the office affected and that, inasmuch as the party in question had in fact made a nomination, the law required that a misrepresentation be made to the voters. As will appear later, the framers of the New York statute invented a device to meet this obviously serious criticism.

Turning for a moment from the legal side of this discussion to the political, let me point out to those not familiar with recent New York politics the circumstances which explain Tammany's attempt to take a leaf out of the Michigan statute book.

Mr. Edward R. Finch, to whom New York is largely indebted for the "signature law" of 1908 (requiring a voter to sign his name in the books kept by the election officers, first when he registers for the election and again when he casts his ballot

[1] Todd *v.* Election Commissioners, 104 Michigan, 474; State *v.* Bode, 55 Ohio State, 224; State *v.* Anderson, 100 Wisconsin, 523.

[2] Murphy *v.* Curry, 137 California, 479.

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upon election day), claims that the effect of that law has been to cut down the fraudulent vote in New York City by not less than 30,000.[1] Besides this, a growing independence on the part of voters in New York City, together with other influences, has had its effect upon the "normal" machine vote. Whatever the reasons may be, the city election of 1909, from which (owing to the fusion of the Republican and Independence League parties upon a common city ticket, excepting only the office of mayor) Tammany emerged with a mayor but without any of the other city officers, even losing the borough presidency in its own stronghold, Manhattan, forced Tammany to take serious thought for the morrow. The Democratic wave of the following year swept that party into undisputed control of the New York legislature and made the New York City organization the dominant factor in the session of 1911. A Democratic governor, also carried in by the same wave, whose chief desire seemed to be that of preserving outward harmony in his party, completed the stage-setting for a legislative drama moving to the appropriate and foreordained dénoûment.

It was under these favorable political auspices that the dominant party in the New York legislature addressed itself, in 1911, to the task of putting a hobble on fusion and the independent voter. In endeavoring to utilize the Michigan plan, however, it was confronted, as we have already seen, by differences of opinion in the courts of last resort of the central and Pacific states upon the question of the constitutionality of any such discriminatory provisions; and the latest and best considered case was adverse. Worse than that, a somewhat similar question had been presented to the New York Court of Appeals in 1910, and here also the decision was adverse.[2] In the Callahan case the provision held to be unconstitutional prohibited (under circumstances which it is unnecessary to state in detail) the nomination of the candidate of one party by another party. A majority of the court agreed with Chief Justice Cullen in holding that a party or independent political body had the right "to nom-

[1] "The Fight for a Clean Ballot." *The Independent*, May 12, 1910.

[2] Matter of Callahan, 200 N. Y. 59.

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inate as its candidate any person who is qualified for the office," and that the legislature could not prevent the nomination of a candidate simply upon the ground that he had been already nominated by another party.

The electors have the right to vote for whom they will for public office, and this right cannot be denied them by legislation. Equally, any body of electors has the right to choose whom it will for its candidate for office and to appeal to the whole electorate for votes in his behalf.

It was obvious then that no restriction which would have the effect of prohibiting one party from nominating a candidate already nominated by another party would escape the condemnation of the Court of Appeals. It was almost equally certain, in view of the language and spirit of the Callahan decision, to say nothing of the decision in the California case, that no scheme which in effect would exclude a candidate's name from the column of any party nominating him and substitute the false statement "no nomination" would escape similar condemnation; and it would be only slightly less hopeless to attempt to exclude the name and leave the space wholly blank. Confronted with these very real difficulties, the legislative majority was constrained to invent some new device, which might in fact withhold while it wore the air of giving. The Levy Election Law accordingly provided that parties might freely nominate the candidates of other parties, but that the name of a candidate nominated by more than one party could appear but once on the ballot. Such a candidate must elect in which party-column his name should appear. So far this was like the old scheme. But the act went on to say that in the column or columns of the other party or parties, instead of the candidate's name, should appear a cross-reference, in the words "see Republican column," or "see Democratic column" *etc.*, as the case might be. It was further provided that, while each "political party" (*i. e.* each political organization that had cast 10,000 votes for governor in the last preceding gubernatorial election) should always have its separate column upon the ballot with its emblem and party circle at the top (even though it had not a single candidate who was not also the candidate of some other party,

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in which case its column would contain nothing but cross-references), an "independent body" (*e.g.* a municipal party or any other political organization not running a candidate for governor and casting 10,000 votes for such candidate), in case of *complete* fusion, should have no place upon the ballot, but should be represented merely by its miniature emblem placed before the names of such candidates as it might endorse, with nothing elsewhere upon the ballot to indicate to what organization such emblem belonged. Upon the day of the argument of the Hopper case in the Court of Appeals, the legislature, in a vain effort to meet some of the criticisms directed against the Levy law, rushed through a bill embodying one or two minor amendments. One of these eleventh-hour amendments provided that large emblems, with the names of such independent bodies as had no separate columns, should be printed upon the ballot stub, in order that the ballot might indicate upon its face, by way of a marginal note, to what bodies the miniature emblems belonged. These amendments did not substantially affect the character of the measure, and they did not save it.

It should further be noted that this statute not only prohibited all but one of several fusing parties from printing their candidates' names upon their tickets, but also expressly provided that a cross-mark in the circle at the head of any party column should operate as a vote for those candidates only whose names were printed in that column, and not as a vote for the candidates designated by cross-references to other columns.

It requires little practical political experience or study of ballot laws to see that these provisions would affect adversely only parties desirous of fusing against a common enemy, and that they would put obstructions chiefly in the path of the independent and discriminating voter who might wish to split his ballot. More closely analyzed, they would have the following results:

(1) A party nominating the candidate or candidates of another party appears in the field on election day with a maimed and incomplete ticket. This impairs the party's prestige and consequently the chances of its other candidates. It is well known that a partial ticket does not receive the same consideration from the voters that a full ticket does.

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(2) The voter is denied the right to indicate his support of his party's candidates *as such*, and he is driven either to forego supporting them or else to indicate his support of them as the candidates of another party, sometimes of a party he intensely dislikes. It is well known that many voters, if dissatisfied with their own party or with its management or with some policy or candidate, stay at home and refuse to vote rather than go to the polls and vote for the candidate of another party. It is clear that such voters would be unwilling to vote for a candidate who was primarily designated as the candidate of another party, although they would vote for him if his name appeared in the column of their own party. Such an attitude of mind may be regarded as unreasonable, but it is common, and the innocent candidate affected by it is entitled to sympathy.

(3) The fusion voter is denied the privilege accorded to other voters of voting for all the candidates of his party by a single mark (we are dealing, it must be remembered, with the party-column type of ballot) and is compelled to search through a complicated ballot for a large number of candidates. To vote a complete ticket he may be compelled to make a large number of voting-marks, depending upon the extent to which fusion has taken place and the consequent number of cross-references appearing in the column of his own party. For example: had this form of ballot been in use in New York City in 1909, a member of the Civic Alliance[1] would have had to make sixteen separate marks in order to vote his party's complete ticket, unless he was willing to adopt the alternative of putting a cross in the Republican party-circle and of making a small number of crosses in his own column for candidates on whom there was no fusion. There would have been absolutely no way in which a voter could have voted the Civic Alliance ticket "straight," *i. e.* by a single cross-mark. A Democratic voter, on the other hand, would have been able to vote his entire ticket "straight" by a single mark.

As the Levy law was passed, and as it stood on the

[redacted]

[1] The Independence League or Hearst party under another name. The name was adopted because the Independence League primaries had been captured by Tammany prior to the election.

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statute book up to the day on which the question of its constitutionality was argued in the Court of Appeals, a political party fusing upon the office of governor faced a possible loss of its existence as a political party. This seems an extraordinary statement; but that this effect was no academic and remote possibility is illustrated by the political situation in New York state in 1906. In that year the Democratic party nominated William R. Hearst for governor; so did the Independence League. Suppose the Levy law had then been in effect. Also suppose that Mr. Hearst had elected to have his name appear on the ballot in the column of the Democratic party. From election day on, the Independence League would have lost its status as a "political party," making nominations by convention like other "political parties," and would have become an "independent body," making nominations by petition; because there would have been no way for it to poll 10,000 votes for its candidate for governor. All the votes for Mr. Hearst would have been cast for him as the Democratic candidate. Suppose, on the other hand, that Mr. Hearst, being primarily the candidate of the Independence League, had elected to appear in the column of that party; the boot would have been on the other leg, and the Democratic party would have lost its status. Of course, as a practical matter, under such circumstances no such fusion would have taken place; but this is only to seize the other horn of the dilemma and to admit that the practical effect of the law would be to prevent parties from nominating such persons as they please, and that is the very thing the Court of Appeals declared unconstitutional in the Callahan case.

Among the amendments, already referred to, that were hurried through the legislature on the day on which the Hopper case was argued in the Court of Appeals at Albany, was one which provided that 10,000 votes for *any* state officer might be taken as qualifying a "political party." This amendment left parties free to fuse on the office of governor. It is quite evident, however, that it did not do away with the difficulty which we are considering; it simply transferred it from the office of governor to the state ticket as an entirety. Under the amendment every office must be excepted by a political party arranging

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The party might elect which office it would except, but some exception there must be. It is obvious that this device did not meet the constitutional objection.

In considering the constitutional question raised by the Levy law, as in considering the propriety of that measure from a political or legislative point of view, the historical line of approach seems helpful.

The party columns on an official blanket ballot are merely the successors of and substitutes for the separate unofficial party tickets formerly in use but now abolished. Formerly, when the ballots were physically the separate tickets of the various political organizations, when each party, faction or organization printed and distributed its own ticket to be used as a ballot, no one had the temerity even to suggest that parties A and B might be allowed to print their tickets and distribute them among the voters, but that organization C might be prohibited from so doing. Any such law would obviously have been unconstitutional. But in what way does the device of setting the separate tickets of the various political organizations edge to edge and printing them on a single piece of paper, for the purpose of safeguarding the election against fraudulent ballots, change the essential character of the separate tickets? To the writer it seems obvious that, so long as the party-column type of ballot is prescribed, the legislature can no more substitute for the name of a candidate upon the ticket of any political organization a direction to the voter to "see such and such a column," than in the days of the separate-party-ballot system it could have said to a political organization: "You can provide ballots with the names of fifty per cent of your candidates thereon, but if anybody wishes to vote for the other fifty per cent they must use the ballots of such and such another party." There is, indeed, a proper way of providing that the name of a fusion candidate shall appear but once upon the ballot, and that is by abolishing party columns and grouping the names of all the candidates for each office under the title of the office, the name of each candidate being followed by the names of the several parties nominating him. This method has been employed in Massachusetts for more than twenty years, and it is now in use

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in fourteen other states.[1] But it would seem elementary that, so long as the party column is retained, its use ought not to be permitted to one organization and prohibited or restricted in the case of another.

The opponents of the Levy law made no claim that under the New York constitution the voter is guaranteed the opportunity of voting in such manner as will express his support of certain political principles, or that he must be accorded the opportunity of voting for all the candidates of his party by a single cross-mark, or that he must be able to ascertain from the ballot itself who are the candidates of his own party, so that he may vote for them as such and because they are such, or that the constitution prescribes in effect any particular form of ballot. On the contrary, the opponents of this statute admitted that these were matters within the discretion of the legislature. But what they did claim was that, if these rights were given to one party or political body, they could not be withheld from others. The criticism was not that the law unwisely regulated the form of the ballot, but that such regulations as it imposed were discriminatory, affecting different political organizations unequally and not permitting them to compete on the same basis at the polls.

In the court of first instance (the supreme court at special term) Justice Gavegan of New York county held the ballot provisions of the Levy Election Law unconstitutional, saying:

> The right to merely nominate is empty and ineffective unless the act of a convention or of those nominating by petition be followed by compliance with other provisions of the Election Law and be reduced to the form of an official ballot to be submitted to the electors.

[1] New Jersey and California joined the "Massachusetts" or "office-group" ballot states in 1911. The others are Arkansas, Florida, Maryland, Massachusetts, Minnesota, Mississippi, Nevada, Oregon, Tennessee (application of law restricted) and Virginia; also Colorado, Nebraska and Pennsylvania, where the system has an undesirable "straight-vote" rider. For an admirable digest and comparative statement of the ballot laws of all the states, from the introduction of the Australian form of ballot into this country down to and including the year 1910, see Arthur C. Ludington, American Ballot Laws, 1888–1910, published by the University of the State of New York as Education Department Bulletin no. 488 (February 1, 1911), also known as New York State Library Bulletin, Legislation, no. 40.

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The case was appealed to the appellate division; and there, by a divided court (four justices to one) the decision of Justice Gavegan was reversed. Presiding Justice Ingraham, who wrote the opinion of the court, held that the provisions of the law alleged to be unconstitutional were a mere regulation of the form of the ballot and not an obstruction to or interference with the right of the voter of which the court would take notice. He seemed to think that so long as a voter was not "prevented from voting for any candidate for office" his rights were in no way "restricted," no matter what dissimilar and superior privileges might be accorded to other voters; and he supported his conclusions with the following argument:

> It certainly cannot be assumed that the electors are so little concerned with the persons whom they desire to elect to office that they will not take the trouble to look through the ballot and pick out the names of the candidates for whom they desire to vote.

This might possibly pass for a good reason in Utopia, but it hardly meets the charge of discrimination between different political organizations and the electors composing them in New York. Indeed, Justice Ingraham's assumption is quite contrary to fact; and that the entire electorate is not made up of such paragons of civic intelligence as the learned justice seems willing to assume is known to every citizen outside a court room. Were proof needed, it abounds in election statistics. Two examples may be drawn from recent New York city elections.

Reference has been made above to the capture of the Independence League primaries by Tammany in 1909. One of the consequences (omitting the details which would explain this absurdity) was that the nominal Independence League appeared as usual upon the ballot, but with the words "no nomination" printed under the title of every office in its party-column, while the real Independence League party had another column on the ballot, under the new name of "Civic Alliance," with a new and different emblem to distinguish it. Notwithstanding these facts and the notoriety given to the whole situation by the press, 14,000 straight ballots were cast in the city for the empty ticket of the Independence League. In spite of everything, 14,000

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voters made their crosses in the party circle of a ticket which contained not a single nomination.

In 1905, it will be remembered, William Travers Jerome, having been refused a renomination to the office of district attorney in New York county by Tammany, ran as an independent candidate. Mr. Jerome had a large following, and the contest was regarded as a battle against "boss rule." Shortly before election day, but after the time allowed by the election law for a candidate to decline a nomination had expired and after the printing of the ballots had begun, public opinion forced Mr. Flammer, the Republican candidate for the same office, to withdraw, in order that Mr. Jerome might be adopted by the Republicans as their candidate. But it was too late to change the ballot. In spite of the wide publicity given to the facts and the great public interest aroused by the situation, Mr. Flammer, though no longer a candidate, received in New York county 13,000 useless votes.

If under such circumstances thousands of voters throw away their votes, what would they do with a ballot full of cross-references to other columns, through which the average voter might wander searching for his candidates only to abandon the quest in despair? What a pit-fall for the unwary! Either this, or the ineffective straight vote in the circle of a minority party!

Let us, however, develop the argument a little further and see what a more general experience shows. It is a well attested fact that an apparently slight difference in the rules for marking the ballot will produce in practice a very marked difference in the actual vote cast. In 1906 the late Philip Loring Allen[1] demonstrated by abundant and carefully analyzed statistics that very slight differences in the methods prescribed for voting a split ticket in different groups of states produced remarkable differences in the extent to which the voters split their tickets. He chose five such groups of states. In the first group split-ticket voting was as easy as straight-ticket voting, for in either case the name of each candidate voted for had to be separately marked. In the second group, a straight ticket could be voted

[1] "Ballot Laws and their Workings." POLITICAL SCIENCE QUARTERLY, vol. xxi, pp. 38–58.

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by means of a single cross-mark, while for each candidate not on the party ticket an additional cross-mark had to be made elsewhere, as under the present law in New York. In the third group, a straight ticket could be voted by means of a single cross-mark, while for each candidate not on the party ticket not only must a cross-mark be made elsewhere on the ballot but the name of the corresponding candidate on the party ticket must be erased. In the fourth group, a straight ticket could be voted by means of a single cross-mark or by a line drawn through each of the other columns, but to vote for a candidate not on a party ticket his name had to be written or pasted in the party column. In the fifth group, a straight ticket could be voted by means of a single cross-mark, but to vote a split ticket the name of each candidate had to be marked separately. According to Mr. Justice Ingraham's theoretical criterion, the difference in difficulty between these various methods prescribed for voting a split ticket would seem almost negligible. In practice, however, as Mr. Allen shows by an analysis of the returns from the general election of 1904, the average percentage of split-ticket voting in each of the above groups (based on the difference between the largest vote and the smallest vote received by different candidates of any one party) was 18.11 per cent in the first group, 7.30 per cent in the second, 8.48 per cent in the third, 4.39 per cent in the fourth and 4.85 per cent in the fifth. A selection of other bases for computing the percentage of split-ticket voting yielded even larger differences between the different groups, the greatest difference being between 19.08 per cent in the first group and 3.88 per cent in the fifth.

Experience demonstrates in other fields the operation of the same principle.

It is a psychological fact, well known and painstakingly acted upon in the business world, that a very slight difference in the amount of labor required in cases where large numbers of persons are concerned may mean an immense difference in the actual result secured. For example, in advertising or in the sending out of appeals for information or for money, the least apparent difference in the amount of concentration required to read an advertisement, or in the amount of energy required to indicate answers to a set of submitted questions and return

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these answers to the sender, or in the effort required to send money by one process rather than by another, may, as any practical man well knows, spell all the difference between success and failure. If this fact is so well recognized in the business world, must it not also hold true where masses of voters are asked to indicate their wishes on a printed ballot?

A varying amount of actual labor as between the different processes by which masses of persons are required to act is not the only cause of marked differences in result. Another fertile cause of such resulting difference is an initial difference between simplicity of method on the one hand and complexity on the other. Small differences in the make-up of railroad time tables mean immense differences in the convenience of the traveling public. The same is true of the methods for recording purchases prescribed for clerks in department stores, of the forms provided by the post office for making out money orders, of the instructions to users of a pay-station telephone *etc.* In all such cases an extreme of clearness and simplicity, which from an *a priori* theoretical point of view would seem unnecessary, has been found in practice to be absolutely essential, and even the slightest increase in the complexity in the rules is known to cause an enormous increase in the amount of confusion and mistakes, or of inaction due to fear of mistakes.[1]

It is idle to say that such considerations do not apply to the voter and his ballot. Increase the complexity of the rules of marking ever so slightly, and, no matter how clearly such changes may seem to have been explained to the voters, you invariably multiply, apparently out of all proportion to the difficulties you have created, the number of ballots rendered void or inoperative because of mistakes in marking. What is really more disastrous to the state, you prevent the voters from doing what they would otherwise do, were there a simpler way to do it.

If we look at the facts, and not at some theory of what they ought to be, we shall see that the discriminations between voters of different classes which the Levy law created amounted to a very substantial infringement of the equal rights of voters belonging to parties or independent bodies that were united in a fusion movement.

[1] Quoted by permission from an unpublished manuscript of Mr. Ludington, author of the monograph cited *supra*, p. 44, note.

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The Court of Appeals did not ignore these practical considerations. It judged the intent and character of the statute according to the effects which it was sure to produce. Without a dissenting voice the court held the discriminations in question to be "of a very substantial character" and the act unconstitutional. From henceforth all citizens, including bosses and legislative puppets, must take notice that the constitution of New York requires "that every elector shall have the right to cast his vote without unnecessary discrimination against him as to the manner of casting his vote"; "that each voter shall have the same facilities as any other voter in expressing his will at the ballot-box, so far as practicable"; that,

> while the constitution does not guarantee that the elector shall be allowed to express his vote by a single mark, he is guaranteed the right to express his will by a single mark if other voters are given the right to express theirs by a single mark and there is no difficulty in according the right to all;

that "inequality in the facilities afforded the electors in casting their votes may defeat the will of the people as thoroughly as restrictions which the courts would hold to operate as a disfranchisement of voters"; that the fact that "many coalitions between various bodies of electors are corrupt and criminal" does not give the legislature the right to forbid all coalitions, "or indirectly effect the same thing by rendering it more difficult to vote for a coalition nominee"; that, on the contrary,

> the liberty of the electors in the exercise of the right vested in them by the constitution to choose public officers on whatever principle or dictated by whatever motive they see fit, unless those motives contravene common morality and are therefore criminal, such as bribery, violence, intimidation or fraud, cannot be denied.

The provisions of the New York constitution which the Levy law was held to violate are not specific; they are of the most general tenor. Article 1, section 1, provides: "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." The court held it

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to be a necessary implication from this provision, coupled with the other general provisions giving qualified citizens the right to vote, that the opportunities to vote accorded by the legislature should not be unequal. The court said:

> Necessarily in all constitutions or other instruments there are certain propositions which the instruments import, as well as those they express and in terms assert. Therefore it is well settled that legislation contravening what the constitution necessarily implies is void equally with legislation contravening its express commands. . . . It is therefore clear that the otherwise plenary power granted to the legislature to prescribe the method of conducting elections cannot be so exercised as to disfranchise constitutionally qualified electors, and any system of election that unnecessarily prevents the elector from voting or from voting for the candidate of his choice violates the constitution. We think the constitutional provisions recited and the provisions that certain officers shall be chosen by the electors necessarily further imply that every elector shall have the right to cast his vote with equal facility to that afforded to other voters, or, to speak more accurately, without unnecessary discrimination against him as to the manner of casting his vote.

Referring to the contrary decisions in Michigan, Ohio and Wisconsin, and to the argument that the sole constitutional right guaranteed to the voter was "a reasonable opportunity to vote," the court said:

> With great deference to the learned court from which we have quoted, in our opinion the constitution, by providing that certain officers shall be chosen by the electors, does guarantee that each voter shall have the same facilities as any other voter in expressing his will at the ballot-box so far as practicable. Any other principle, in our judgment, would be destructive of fair elections.

In illustration of the principle of implied guaranties, the court cited the well-recognized limitation upon the power of eminent domain. The constitution declares that "private property shall not be taken for public use without compensation." This is held to mean that private property shall not be taken for private use.

The effect of this New York decision may well be far reaching. Its assertion of the fundamental right of the individual voter and of groups of voters in political organizations based

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upon whatever principle or principles they please (barring only criminal considerations) to a "square deal," including the right to compete at the polls upon equal terms with any other organization, however entrenched through power, popularity or tradition, will have its influence far beyond this state. Unlike the California decision, it is not bound up with and can not be held to be limited by any consideration of deliberate misstatement upon the face of the ballot. It is a clear and decisive affirmation that state constitutions are to be broadly construed, according to their spirit rather than according to their letter, in defence of the fundamental rights of voters. It furnishes an encouraging answer to those technical lawyers who are prone to exaggerate the difference between natural reason and what Coke called the "artificial reason" of the law, and who say, of a tricky bit of legislation: "It's a raw deal, as any judge can see on the golf links, but will he see it on the bench?"

The fundamental disloyalty of this type of legislation to our institutions puts the discussion of the subject quite outside the realm of party politics. Patriots of all parties may well unite in execration of such attempts. Their essential character is well summed up in the following words of a prominent speaker at one of the meetings of the last campaign, who described the statute as

> a bold and defiant attempt to rob you of your political rights and liberties, and so to bind and gag you that you would be unable effectively to protest. If you do not rebuke such intolerable insolence you can hardly be said to deserve the liberties you have. To my mind an attempt to curtail the political rights and liberties of the citizens is the greatest treason that a republic can know.[1]

It should not be implied from what has been said that the Levy law contained no meritorious or at least defensible provisions. The requirement of personal registration, heretofore operative in cities and in villages of 5000 inhabitants or over, was extended to the entire state. The "signature law," heretofore applying to New York city only, was likewise extended over the whole state. How far these protections are necessary

[1] *New York Times*, October 20, 1911, p. 3.

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in rural communities may indeed be disputed, but their extension cannot be opposed on other grounds than those of expediency. But the provisions upon which some claim of virtuous purpose can be based were so few and of such minor importance that to justify the Levy law is to lose all sense of proportion. Should further illustration of the general character of the law and of its presumable motives be desired, the attention of the reader may be called to the following features: (*a*) the additional difficulties placed in the way of independent nominations by petition; (*b*) the new limitations upon the classes of persons who may be drawn upon as watchers and challengers to safeguard the honesty of registrations and elections in New York city; (*c*) the diversion of the activities of the special bureau charged with the duty of safeguarding elections in the metropolitan elections district (practically New York city) to the entire state; (*d*) the shortening, in New York city, of the period available for investigation of illegal registration, *i. e.* the period between registration and election; (*e*) a series of provisions tending to debase the electoral machinery itself, *viz.* provisions legislating out of office the commissioners of elections in New York city, heretofore appointed by the mayor, and vesting the appointment of their successors in the members of the board of aldermen, and provisions (probably) taking the employees of that commission out of the classified civil service and permitting the appointment as election officers without examination of persons who have served as election officers at any time in the past. The latter provision was the direct result of the determination of a new board of elections to have real examinations in the place of shams.

Still another provision of this law was designed to attach a special difficulty to the registration in 1911 of those up-state Republicans who did not vote in 1910. This provision has already suffered the same fate as the ballot provisions; it has been declared unconstitutional, although upon other grounds, *viz.* as in conflict with an express provision in the constitution relating to personal registration in rural communities.[1]

A word may be added with respect to the view taken by the courts as to the appropriate time to raise the issues presented in

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the Hopper case. The question was as to the form of the ballot in a coming election. The time for the preparation of the ballot had not yet arrived. The officers charged with this duty had not done anything illegal. It was to be presumed, however, that they would make up the ballot in conformity with the new law rather than with the old. It would be their duty so to make it up. It was not for them to decide that a statute was unconstitutional and to refuse to obey it. Under these circumstances the courts took a common-sense rather than a technical view of the situation. They recognized that it would be too late to take up the case when the time for printing the ballots arrived, that the issues were not contingent but actual, and that it would be proper to decide the case in advance.

The foregoing discussion has been confined to the form of ballot employed at the general or November elections. A similar question, however, has arisen in connection with the form of the primary ballot. The Primary Law Amendments[2] passed by the New York legislature of 1911 contain a restriction identical with that which was pronounced unconstitutional in the Hopper case, *viz.* that no name may appear in more than one place on a primary ballot. Inasmuch as the separate primary ballot of each party is to be arranged in the same manner as the general-election ballot, with separate columns for rival factions within the party, question is raised whether in this case also the provision that no name may appear in more than one column is not contrary to the principles of equality, and this law also has been attacked as unconstitutional. It will be of interest to see whether, in the judgment of the courts, the same considerations which led the Court of Appeals to condemn the ballot provisions of the Levy law do not apply to these primary-ballot provisions.[3]

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NEW YORK CITY.

[1] Matter of Fraser *v.* Brown, 203 N. Y. 136.

[2] Laws 1911, ch. 891.

[3] Since this article was put into type, Mr. Justice Bijur has held these and other provisions to be unconstitutional, including one permitting the appropriation of the party emblem by a single faction, *viz.* "the organization." Matter of Hopper and Hearst *v.* Britt, *N. Y. Law Journal,* January 10, 1912. An appeal is pending.

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STATE TAXATION OF INTERSTATE COMMERCE. II

IN the first part[1] of this discussion, the following propositions were sufficiently established:

(1) So long as the state confines itself to *ad valorem* taxation, avoids discrimination against outside corporations or businesses and does not carry taxation to confiscatory extremes, the right of the state to burden tangible property within its jurisdiction is intact and unquestioned.

(2) It does not at all matter for the purposes of this *ad valorem* taxation that the value of the tangible property within the state may depend partly—or conceivably even wholly—upon the fact that this property is an instrument of interstate commerce. The sole question is: what is its actual value as an item of property within the taxing jurisdiction? The burden, however, must be no greater than the rates imposed upon similar classes of property within the state; that is to say, there must be no discrimination.

(3) Upon corporations of its own creation the state may impose (*a*) such fees as it will as a condition of corporate existence under the state authority and (*b*) such burdens as it will upon the rights and privileges of internal traffic, provided only that nothing more than the value of this right or privilege be taken. The state may, therefore, appropriate all of the earning power of the franchise or privilege, but not more; that is, the state must leave to the tangible property a fair return of interest; otherwise, there is confiscation.

(4) When the corporation or business is foreign, and the tangible assets within the jurisdiction are a part of an entire system, and consequently can have ascribed to them no distinguishable and adequate value as separate things but only as an inseparable fraction of the property of the system, the value ascribed to the domestic fraction—inclusive of franchises and privileges—may be arrived at under the so-called unit rule,

[1] POLITICAL SCIENCE QUARTERLY, December, 1911, vol. xxvi, pp. 643-658.

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namely, by apportioning to the state such a share of the value of the system as the state plant or mileage or traffic or gross receipts or net receipts may bear to the corresponding aggregate.

It is therefore evident that, although the powers of the state do not extend so far as to tax interstate commerce as such, there is none the less a clear right to tax the values of those instruments within the state through which such commerce is carried on.

But when the business within the state is controlled by an outside ownership, a distinction is called for. Citizens of other states doing business within a state are entitled under the federal Constitution to the same privileges and immunities as citizens of the state. The right to do business within the state on an equal plane with citizens of that state cannot be denied. Not so, however, with outside corporations; they are not "citizens." With the exception of those engaged in interstate commerce, all corporations may be excluded from the state, or, if admitted, may be subjected in general to such terms and conditions as the state may impose.

If, however, the outside corporation or business be engaged in interstate traffic, what, if any, are the limitations upon the powers of the state, especially with regard to the intrastate activities of the interstate undertaking? That part of the interstate traffic performed within the state is, *as traffic or commerce*, beyond the taxing power of the state, although, as has been indicated, the instruments employed in such traffic are subject to the *ad valorem* burden. But what about the purely internal traffic? May the state fix the rates upon this as it will, subject only to the prohibition of confiscation? May it tax this domestic traffic otherwise than on the *ad valorem* principle? May it burden the right or franchise or privilege of carrying on this intrastate activity? May it charge, as rent or as privilege tax, the full earning value of the privilege? May it impose burdens or limitations upon the interstate traffic as conditions upon which shall be granted the permission to carry on these purely domestic activities?

Under the general right of the state to exclude from its

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borders any foreign corporation, provided only that this involve no interference with the agencies of the federal government or with interstate commerce, the right of the state to deny entry to foreign insurance companies, has been long established: insurance is not commerce.[1] And, while it was admitted in People *v.* Equitable Trust Company[2] that a state may tax neither the corporate franchise of a foreign mortgage company nor its property or business outside of the state, it was held that a state may tax a corporation upon the basis of the dividends declared on its total capital stock. This tax, however unjust, purports to tax only the right to do business within the state and is precisely parallel to burdens upon pedlers, hotels, saloons, banks *etc.*[3] If, however, the tax by the state purports to be a tax upon the property within the state, the value of this property cannot be determined, in the case of a foreign manufacturing corporation, by assessing such a fraction of its capital stock as corresponds to the ratio of sales within the state to total sales. In People *ex rel.* Seth Thomas Clock Company *v.* Wemple,[4] the court said that of the actual property of the company "only such part was employed within the state as was represented by the actual value of property, whether in goods, money, or other tangible things." It is not altogether clear, however, whether this decision should be taken to condemn the tax as extra-territorial or as in substance a tax upon interstate sales.

In essential harmony with the foregoing authorities and with the doctrinal summary already presented is another line of cases. It is true that in Osborn *v.* Mobile[5] a city excise upon an express company doing business both within and without the state had been upheld; but later a long line of decisions estab-

[1] Paul *v.* Virginia, 8 Wallace, 168 (1868). [2] 96 N. Y. 387 (1889).

[3] The right of excluding foreign corporations appears still to be intact; but later cases have seemingly encroached upon some corollaries of the earlier proposition. If the corporation has already been admitted to the state, it can make good its claim to protection under the laws as measured by the treatment accorded to domestic corporations of like character. *Cf. infra*, pp. 59 *et seq.*, especially pp. 63, 66, 67.

[4] 133 N. Y. 323 (1892).

[5] 16 Wallace, 479 (1872).

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lished the contrary doctrine.[1] The tax disallowed in Caldwell *v.* North Carolina was imposed on commercial travelers. But under its general police power the state may tax, for example, liquor merchants or wholesalers, providing that these be not engaged exclusively in importation. So where the state of Georgia levied a tax "upon all agents of packing houses doing business within the state" whether the principals were domestic or foreign, and where it appeared that the agent in question did some warehousing and merchandising as intrastate business, the tax was upheld as a tax upon the domestic traffic.[2] *A fortiori*, it is clear that a license tax is valid where only the intrastate traffic is burdened.[3] And none of these cases is to be understood to deny to the states certain rights of levying local fees and assessments or certain limited police powers, although the exercise of these rights and powers may involve some measure of regulation of interstate commerce or of interference with it. For example: a state may require that an interstate carrier have and maintain a domestic place of business and an agent upon whom process may be served;[4] within reasonable limits, it may be required that through trains stop at certain stations; reasonable charges may be imposed by the city on telegraph and telephone companies for the privilege of setting poles in streets or alleys or public places, irrespective of the fact that the company may have a federal charter conferring "the right to construct, maintain, and operate lines . . . over and along any of the military or postal roads of the United States" and of the further fact that "all letter-carrier routes in

[1] Moran *v.* New Orleans, 112 U. S. 69 (1884); Pickard *v.* Pullman Southern Car Company, 117 U. S. 35 (1885); Robbins *v.* Shelby County Taxing District, 120 U. S. 489 (1886); Leloup *v.* Port of Mobile, 127 U. S. 640 (1887); Norfolk *etc.* Railroad *v.* Pennsylvania, 136 U. S. 114 (1889); Adams Express Company *v.* Ohio, 165 U. S. 194 (1897); Stockard *v.* Morgan, 185 U. S. 27 (1901); Caldwell *v.* North Carolina, 187 U. S. 622 (1902).

[2] So in Ficklin *v.* Shelby County Taxing District, 185 U. S. 127 (1901), and in Kehrer *v.* Stewart, 197 U. S. 60 (1904).

[3] Ratterman *v.* Western Union Telegraph Company, 127 U. S. 411 (1887); Pacific Express Company *v.* Seibert, 142 U. S. 339 (1891); Postal Telegraph Cable Company *v.* Charlestown, 153 U. S. 692 (1893).

[4] Fritts *v.* Palmer, 132 U. S. 282 (1889).

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any city or town" are "established as postal roads." A city still has the right to a reasonable rent for the use of its streets.[1] So inspection charges may be imposed, if these be not excessive and are not made a cover for privilege taxes or other illegal exactions.[2]

Assuming that the state may exclude insurance and similar corporations from its borders, and may impose, as conditions of admission, whatever burdens of taxation it will, does the right of fixing the conditions of admission extend to compelling a waiver of constitutional rights? May the state require, for example, that an insurance company shall not avail itself of the protection of the United States courts? In Doyle *v.* Continental Insurance Company,[3] the Supreme Court was called to pass upon the validity of a state law providing that the foreign corporation should forfeit its right to remain in the state if it removed a case from the state to the federal courts. It is to be noted that no waiver of this right of removal had been imposed as a condition precedent to entry; the law merely provided that the act of removal of the case should terminate the right to remain in the state. The action of ouster was upheld. It was not admitted, indeed, that the laws of the state could be pleaded to defeat the federal jurisdiction; the case would be heard and adjudicated; but the law was held to be valid for its purpose of ouster. The court said:

> As the state has power to refuse permission . . . to do business at all within its confines, and as it has power to withdraw that provision when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial.

In Barron *v.* Burnside,[4] on the other hand, it was decided that the attempt by a state to force upon a corporation, as a condition precedent to its entering the state, a waiver of its right of

[1] St. Louis *v.* Western Union Telegraph Company, 148 U. S. 92 (1892).

[2] Western Union Telegraph Company *v.* New Hope, 187 U. S. 419 (1902); Postal Telegraph Company *v.* Taylor, 192 U. S. 64 (1903).

[3] 94 U. S. 535 (1876).

[4] 121 U. S. 186 (1886).

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removal to the federal courts would be invalid. The right is one that cannot be waived or lost on any terms. But the right to remain in the state may be lost or forfeited through the exercise of this very right that can not be waived. In Security National Life Insurance Company *v.* Prewitt[1] both of the foregoing cases were approved. An agreement of the sort under consideration, or a law imposing a waiver to the same effect, will not bar a removal to the United States courts or prevent a decision upon the merits of the case. But the law is valid for purposes of ouster. The court said:

> The truth is that the effect of the statute is simply to place foreign corporations upon a par with the domestic ones. . . . No stipulation or agreement being required as a condition for coming into the state and obtaining a permit to do business therein, . . . the statute says: "If you choose to exercise your right to remove your case into a federal court, your right to further do business within the state shall cease and your permit to do business shall be withdrawn."

This, however, was an insurance case. What would happen if a like law of ouster were applied to an interstate-commerce company, so far as concerned its right to do intrastate business? Or what would happen if the right of such an interstate company to do intrastate business were made conditional upon its submitting to extra-territorial taxation? In Western Union Telegraph Company *v.* Kansas[2] this issue was sharply presented. The telegraph company had been for years doing business within the state of Kansas under a federal charter. Kansas passed a law which required the company to pay taxes upon all its capital stock, on pain of deprivation of all right to do intrastate business. The company refusing to pay the tax (which amounted to $20,100), the state attempted to oust the company from doing intrastate business. The tax was held to be extra-territorial, and the law was held to be unconstitutional, as a denial of due process of law, in that it imposed a penalty for non-payment of an extra-territorial tax. Justice White was of the opinion that, inasmuch as entry had been permitted

[1] 202 U. S. 246 (1905).

[2] 216 U. S. 1 (1910).

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before the tax was imposed, some sort of right to remain had vested. The state admittedly had reserved the right to change the terms of its permit, but it was not in its power to reserve the right to make a change amounting practically to confiscation—a change wiping out of existence a large part of the company's plant. But the decision of the majority of the court was based upon the view that the state law was an attempt to enforce extra-territorial taxation. The state may impose such conditions as it will, provided that these are not unconstitutional. The state must act within the requirements of due process of law.

Justice Holmes dissented upon the ground that the majority position amounted to a denial that the state possessed full power of exclusion. The state, he pointed out, could have charged $20,100 or any larger sum as a privilege fee or tax. It had been held in Horn Silver Mining Company *v.* New York[1] that the state could impose a tax upon the aggregate value of the stock of a foreign mining corporation having an office in New York and transacting in New York some intrastate business. The company could avoid the tax by refraining from entering into any intrastate transactions. And in Allen *v.* Pullman Company[2] the court had upheld a Tennessee tax of $3000 upon "each sleeping car doing business within the state for one or more passengers taken up at one point in the state and transported wholly within the state." There was no compulsion to accept and transact this domestic business; and in Tennessee there was no legal liability upon the carrier company for refusal to accept this sort of business.

Two weeks later, in the case of The Pullman Company *v.* Kansas,[3] the Supreme Court decided an even more significant and disturbing question. In this case a new line of authority appears to have been established. The state of Kansas had imposed a tax upon the authorized capital of the company—one-tenth of one per cent upon the first $100,000 *etc.* The case of the Pullman Company was stronger than that of the Western

[1] 143 U. S. 305 (1891).
[2] 191 U. S. 171 (1903).
[3] 216 U. S. 56 (1910).

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Union Telegraph Company, in that the payment of the tax, which amounted to $14,800, was made a condition precedent to the right of the company to transact intrastate business. On the other hand, no question could well be raised of the confiscation of any existing plant. The tax was held invalid, seemingly both as extra-territorial and as a burden upon interstate commerce. In delivering the opinion of the court Justice Harlan said: "Such a fee necessarily operated as a burden upon the company's interstate business as well as a tax upon its property interests outside of the state, and was hostile to its constitutional right of exemption from local taxation in reference to its property beyond the jurisdiction of the state."

It is evident that two questions are here involved, and it is equally evident that they need to be kept separate. If the Kansas law was an attempt to impose extraterritorial taxation, it was nevertheless true, as had been pointed out in earlier decisions in similar cases, that the company could forego the carrying-on of intrastate business and could thus escape the tax. And it has been repeatedly held that the state, so long as it may be assumed to be acting *bona fide*, may lay such burdens as it will upon purely intrastate traffic without reference to the possible effect upon interstate business. In the *legal* view, these two lines of business are independent of each other, and no court had previously suggested that to burden one was to burden the other.[1] To the economist, indeed, it is clear enough that the two aspects of traffic are necessarily and intimately associated, and that only a logical, not an actual, line of distinction can be drawn. The difficulty is that the courts have drawn the logical distinction, perceiving little else to be done, short of taking the whole matter of the taxation of traffic or franchise or business or privilege out of the jurisdiction of the states, leaving to them only *ad valorem* taxation. This difficulty is driven home by the dissenting judges. Justice Holmes said: "I do not see how the reasoning that denies the power to tax one kind of commerce and asserts it with regard to the other can be reconciled with the denial of the power of the state to exclude the latter altogether or to tax for whatever sum it likes."

[1] *Cf.* Louisville and Nashville Railroad Company *v.* Eubank, 184 U. S. 27.

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No doubt there still remain to the states after this decision the right of *ad valorem* taxation and the right of a reasonable exercise of police authority and regulation. But does more remain? It is extremely difficult to separate, in the reasoning of the court, the question of interference from the question of extraterritorialty. The court said:

> We hold that the Pullman Company . . . could go into the state to transact interstate business within its limits . . . without liability to taxation there with respect to that business, although subject to reasonable local regulations for the safety, comfort, and convenience of the people, which did not, in a real substantial sense, burden or regulate its interstate business nor subject its property outside of the state to taxation in Kansas.

The question of interference is obviously much broader than that of taxation supported by exclusion. How far may an interference with domestic traffic be held to constitute a burden upon interstate traffic? The decision need not have gone further than the decision in the Western Union Telegraph case. In that case an attempt was made to collect an extraterritorial (and therefore unconstitutional) tax under threat of exclusion from intrastate business; in the Pullman case there was an attempt to make the payment of such a tax a condition precedent to the right to engage in such business. But the opinion of the court goes much further than this. It attacks—at least for the purposes of the discussion—the tenability of the distinction between interstate and domestic traffic.

It is necessary to determine the precise purport of the opinion. Does it declare the law invalid for extraterritoriality? It does. Does it hold the law invalid as an interference with interstate commerce? Equally clearly it does. Invalid also as making the payment of an extraterritorial tax a condition precedent to the right of transacting *intrastate* business? The decision is not distinctly based upon this ground, but from the precedents it is clear that it might have been so based. It does, however, seem to declare the tax invalid both on the ground that taxation that interferes with interstate business is made the condition upon which the right to do intrastate business is granted, and

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also upon the ground that this particular sort of restriction imposed upon intrastate business is a real and substantial interference with interstate business. And perhaps the decision goes far enough to justify the inference that neither extraterriality of taxation nor any other unconstitutional purpose can be attained by prescribing the conditions on which an otherwise lawful enterprise may enter a state. If so, there is nothing in the decision peculiar to questions of commerce or of taxation.

But the reasoning of the court requires further examination. Justice White, concurring in the opinion of the majority, goes still further. He argues that there is a stronger case against the state if it has once allowed the entry of the company. To impose a new burden of the sort under consideration, after such entry has been permitted, is not to lay down the terms on which an entry to the state is allowed; it is to impose, as a condition of remaining, something approaching a submission to confiscation. Even if this consideration be waived and the question be regarded purely as one of original entry, he unfolds what appears to be the ultimate implication of the opinion of the majority: "The power as exercised operates a discrimination against commerce, or, what is equivalent thereto, a discrimination against the right to carry it on." A distinction is drawn between the absolute right of states "to control the coming within their borders of foreign corporations," and "the relative right," which is a limited right. If the right is absolute, a corporation "may not assail the constitutionality of the condition . . . ; the validity of the condition is immaterial." In the Horn Silver Mining Company case it was decided that the state had the absolute power to prohibit, and could therefore make submission to extraterritorial taxation a condition to entry or, at all events, to the right to remain within the state. But not so when the right of transacting interstate commerce is affected. The right of exclusion is then a relative right. In the case at bar "the Pullman Company . . . in interstate commerce . . . was independent of the will of the state. . . . The state had no absolute power to exclude, and, therefore, no authority to impose an unconstitutional burden as the price of the privilege of doing local in conjunction with interstate com-

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merce." This seems to mean that when two lines of business, one of them admittedly entirely immune against state attack, are so intimately connected in actual functioning as are interstate and intrastate transportation, they cannot be entirely separated in legal treatment. It is, in fact, this close connection that transforms the absolute right into the relative or limited right. "A state law which entirely forbids . . . a local business would be a direct burden upon interstate commerce."

But if such be the case, the right of the state to regulate local charges is logically in danger. Future limitations upon this power may not need to be worked out as prohibitions against confiscation; they may be developed from the doctrine that the right of regulation is a relative or a limited right, to be exercised only so far as is consistent with due regard to the interests of interstate traffic—a principle, doubtless of extraordinary difficulty in application but entirely apt to express and to safeguard the economic relations actually involved. But to assert that the authority is a limited authority, and that any particular exercise of it does not exceed the legal limit, is simply to declare this exercise to be, under all the circumstances, reasonable and therefore legal. Thus, if a reduction of rates on local traffic is upheld as non-confiscatory, the new rates are not, in strict logic, to be upheld on the ground that they are irrelevant to interstate traffic and independent of it, but on the ground that, as they are not confiscatory, they are not an improper interference with interstate traffic. Again, when restrictions are imposed upon either local or interstate traffic and are upheld as a proper and reasonable exercise of police functions, it is not thereby denied that they are in their effect, whether directly or indirectly, an influence to modify or to regulate the traffic between states; it is merely affirmed that they do not exceed the limits of reasonable and proper interference. Viewed in this manner, it need not matter whether the right of regulation be assigned entirely to the police jurisdiction of the state or be entirely removed from it; the result will be the same.

But the opinion proceeds: "When the power is absolute, no inquiry as to the reasons . . . need be resorted to in order to determine its constitutionality." But in what cases is this power

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thus absolute? And why is it absolute in these cases? Foreign insurance appears to be within the absolute category and may, therefore, be subjected to any sort of treatment.[1] So also may any strictly domestic manufacturing industry.[2] The power of *ad valorem* taxation falls, seemingly, within the relative category, since such taxes must not be discriminating in rate. And city license taxes upon the business of telephone companies are probably of this relative sort, since they are valid if they do not burden interstate traffic and are not made conditions precedent to the carrying-on of interstate business.

No criticism is here offered of this distinction between the absolute and the relative right of exclusion. It promises much for the development of the law as regards the rights of corporations engaged in interstate business. It may finally afford a single thread of principle for the various problems of police power, rates and methods of taxation, limitations upon rates and the line of demarcation between state and national control. And it must be admitted that the decision is a distinct step towards legal recognition of the economic aspects of all these problems. All that is here urged is that the decision establishes a new and extremely significant distinction—one that in its narrowly legal aspects is perhaps revolutionary. This is the view that Justice Holmes indicated in his dissenting opinion. He did not deny the reasonableness of the distinction, but declared that it was novel, and that it could be applied only by overruling a long line of precedents. He said:

> I do not see how or why the right of a state to exclude a corporation from internal traffic is complicated or affected in any way by the fact that the corporation has a right to come in for another purpose. . . . In the sense that the right of the state is not absolute over that particular business, the statement seems to me merely to beg the question that is to be discussed.

Three cases have lately been decided by the United States Supreme Court, each of which is interesting and pertinent to the

[1] Paul *v.* Virginia, 8 Wallace, 168 (1868).

[2] Horn Silver Mining Company *v.* New York, 143 U. S. 305 (1891).

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foregoing discussion. In Southern Railway Company *v.* Greene,[1] the distinction drawn by Justice White between requirements imposed before entry into the state and requirements imposed after entry is held to be controlling; but no use is made of the distinction between the absolute and the relative right of exclusion. Alabama had imposed upon the railway company a so-called "franchise" tax "upon the actual amount of capital stock employed by it in the state." The amount of the tax was $22,450. Payment of this tax was imposed as the condition upon which the corporation should have the right to transact "any business . . . not constituting interstate commerce," and the right "to maintain or commence any action in any of the courts of the state." The payment was not in lieu of any other tax or in reduction thereof. It was not imposed upon domestic corporations "owning the same character of property and carrying on the same line of business." Could a corporation be required to accept this unequal treatment—to forego equal protection of the laws—on penalty of being deprived of the privilege of doing intrastate business? The tax was held invalid. The court said:

> We are not dealing with a corporation seeking admission . . . nor with one which has a limited license which it seeks to renew . . . nor with one which has come into the state upon conditions which it has since violated. . . . We have a corporation which has come into and is doing business within the state . . . with the permission of the state, and under the sanction of its laws, and has established therein a business of a permanent character, requiring for its prosecution a large amount of fixed and permanent property.

Upon the same day was decided Ludwig *v.* Western Union Telegraph Company.[2] The state of Kansas had imposed a tax upon all of the stock of the telegraph company. Non-payment of this tax or the removal of any case to the United States courts was to be penalized by ouster from the right to do any purely intrastate business. Each and every day's continuance in intrastate business after the tax was due and unpaid was to

[1] 216 U. S. 400.

[2] 216 U. S. 146.

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subject the company also to a penalty of $1000. The tax was declared invalid; partly, it seems, as a substantial interference with interstate commerce and partly as an attempt to enforce extra-territorial taxation for the privilege of remaining in the state after having legally entered. The court said:

> These are in effect the conditions upon which the telegraph company, lawfully engaged in interstate business, and entitled to be in Kansas for such business, is permitted to enter the state to do local business. And these conditions are prescribed notwithstanding the company has been permitted for several years . . . to do local business . . . and has invested there large sums of money.

The court cites and follows both Western Union Company *v.* Kansas and Pullman Company *v.* Kansas; and, as in those cases, the decision appears to rest on several distinct bases.

The third case is that of the International Textbook Company *v.* Pigg.[1] A foreign correspondence school, soliciting students and furnishing texts and papers for study, was required by Kansas to file a statement of its condition "showing the amount of the authorized, paid up, par and market value of, its capital stock, its assets and liabilities, a list of its stockholders with their respective post-office addresses and the shares held and paid for by each, and the names and post-office addresses of the officers *etc.*" On the filing of this statement was made to depend its right to maintain any action in the Kansas courts; and it must procure from the secretary of state a certificate of this filing and of the fact that the statement was properly made. Held: "The effect is practically the same as if a form of license was required as a condition precedent to the right to do such business." The business was declared to be interstate commerce. "To carry on interstate commerce is not a privilege or franchise granted by the state. . . . That is a subject which belongs to the jurisdiction of the national and not to that of the state legislature."

The results obtained in the foregoing investigation may be summed up as follows:

[1] 217 U. S. 91.

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(1) A state has the right to tax, by appropriate methods, such share of the aggregate value of the property of the corporation, including intangible property and franchise values, as exists within the state. This taxable share may be determined according to the so-called "unit rule," *i. e.* according to the ratio of the state plant or mileage to the total plant or mileage.

(2) The theory on which the tax is justified is the *ad valorem* theory, according to which each state, in levying the general property tax common to all the states, may burden interstate-commerce property values at the same rate at which other values are burdened.

(3) If any part of the value traceable to the transaction of interstate business be burdened, this burden may not extend beyond the rate permissible under the *ad valorem* principle. To call the tax an excise tax or a privilege tax or a business tax or a franchise tax will neither help nor hurt, providing that it can be regarded as substantially an *ad valorem* tax.

(4) That part of the value of the property derived from the exercise of the right or privilege of internal traffic may be taxed in any way permitted by the institutions and laws of the state, whether under a special classification or under the general *ad valorem* principle. The entire value even of this right or privilege may be appropriated by taxes or by rents or by a regulation of rates, provided only that the burden imposed does not go beyond the limitations imposed by the requirement of "due process of law"—provided, that is to say, that nothing more than the value or rent of the privilege be appropriated; or, in other words, provided that a fair return of interest is permitted to be earned upon the investment in tangible assets and plant. Otherwise there is confiscation.

(5) In the attempt to exercise the right of taxing the corporation values within the state, it is not permissible to tax the gross receipts or the net receipts as such, or to burden in any way the moving traffic. It is, nevertheless, permissible to tax, as a domestic value, such a share of the total value or of the entire mileage as corresponds to the ratio between the property or the mileage or the gross receipts or the net receipts in the state and the total property or mileage or gross or net receipts of the

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corporation. For a similar purpose, all these data or any part of them may be utilized. It is permissible also to take into consideration the dividends declared and the market value of the stock, either at a particular time or through a reasonable period of years, so long as the object is to determine the value within the state and the methods employed appear to be selected and used in good faith and are not obtrusively unreasonable and inappropriate.

(6) The right of the state to burden values derived from interstate activity is strictly limited to the imposition of *ad valorem* taxes upon such portion of these values as may be determined to be within the state. The rates must be such as are permitted under the *ad valorem* principle.

(7) As regards the imposition of burdens upon the purely domestic share of the traffic of foreign corporations engaged in interstate commerce there is great confusion. Until very recently the authority of the state to deny to interstate corporations the right of carrying on purely domestic traffic, and the resulting authority to permit this traffic only upon such conditions and subject to such burdens as the state might see fit to impose, had never been seriously questioned. A purely schematic—and economically impossible—independence of these two lines of traffic had been established. Recently, however, not only has this doctrine been questioned, but particular rules have been laid down which are not in harmony with it. No waiver of any constitutional right can be imposed as the condition of entry of any foreign business, although the exercise of such a right may legally be made the basis of ouster.[1] And in the case of an interstate-commerce business it seems that submission to extraterritorial taxation cannot be made either a condition of entry upon intrastate traffic or a basis of ouster. A law attempting either of these things is invalid, not merely as extraterritorial taxation, but also as amounting to an interference with interstate commerce. It is here submitted that

[1] None of the decisions question or deal with the right to carry to the Supreme Court *on writ of error* cases involving rights guaranteed by the federal Constitution. The restriction of right that has been recognized as permissible is ouster for *removal* of a case from the state court to a federal court.

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the assertion that this particular interference with domestic traffic amounts to an interference with interstate commerce discredits the entire distinction between internal and external traffic. Some interferences with interstate traffic through the regulation of intrastate traffic are to be tolerated. Others are not. The hitherto absolute right of the state has become a limited right; it must be exercised reasonably, all the circumstances being taken into account.[1]

[1] Three recent circuit-court decisions bear upon the foregoing argument. The second of these (Shepard *v.* Northern Pacific Railway) fully supports the principle here contended for. It carries the doctrine of the Kansas Telegraph and Pullman cases to its logical consequences.

In Louisville and Nashville Railroad Company *v.* Siler (January 9, 1911; 186 Fed. Rep. 176) the Kentucky railroad commission, acting under authority of a state statute, had reduced the rates from Covington, Kentucky, to certain other points within the state. It appeared that the rates of the plaintiff road from Cincinnati, Ohio, to these Kentucky points had been the same as from Covington to these points, and that from points farther north of the Ohio River there had been no through rates to the Kentucky points other than as the mere sum of the two local rates. It was held by the court (Justices Warrington, Sanford, and Denison, J. J.) that this change in the local rate south of the river was not an interference with the interstate rate. "Can it be," the court asked, "that such combining and filing of local rates as interstate rates removes such local rates altogether from the jurisdiction of the state for purely state purposes?" The railroad might decline to maintain this basis of computing interstate rates: "It does not follow that . . . the company will continue to carry the burden." The court expressly waived the question "whether there may be facts attending the administration of a state law which show a result so inevitable, for business reasons, that the result should be held to be the direct effect of the law, though not specified in the law. . . . The logic of the company's argument would release its local rates from governmental regulation altogether; for the United States could not fix the local rates, because they are local, and the state could not change them, because it would thereby cast a direct burden on interstate commerce. The inevitable effect would be that, so far as rate-making is concerned, the state railroad commission would have no reason to exist, and state regulation of state rates would become simply historic."

As regards the reasoning in this case it may be remarked that a restriction of the power of a state to fix rates is not necessarily a taking away from the state of all power. The "rule of reason" has elsewhere of late received important applications and extensions. The real question is not properly formulated by the court when it asks: "Must this long-established power be now so construed as to eliminate the local rate-making power?" The real question is whether the jurisdiction of the federal government may not, in some cases, limit to a "reasonable" application the exercise of the local power. In this case the court stated that "no averment [was] made . . . that the new rates would not yield a profit to the carrier."

In Shepard *v.* Northern Pacific Railway Company (April 8, 1911; 184 Fed. Rep. 765) no reference was made to the Kentucky decision, which was probably not then

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The original purpose of the foregoing investigation was to determine, so far as should prove possible, with what authority, state or national, lies the right of appropriating for social purposes the unearned-increment values attaching to the right to transact interstate commerce.

If the foregoing summary is a correct statement of the existing legal situation, it is evident that the authority of the state does not extend so far as to make possible the appropriation by the state of all of the unearned-increment values in the case of property employed in interstate commerce. Within the limits imposed by the rule against confiscatory taxation, the state may, it is true, impose lowered charges for services, but not

accessible. Rates imposed by the Minnesota commission upon local traffic were denounced by Judge Sanborn as confiscatory. But these rates were also condemned on the ground that the reduction of charges within the state necessarily carried with it a reduction of charges in interstate traffic. "The acts . . . and the orders . . . are so general and so far reaching in their effect that . . . they unavoidably affect the interstate commerce of the companies. . . . The question . . . therefore becomes: Do these statutes and orders substantially burden or only incidentally or remotely affect the interstate commerce of the companies? . . . The touch-stone to the true answer to the question and the test of the validity of the orders and statutes is their effect upon interstate commerce. It is the effect, and not the terms or purpose of state regulations of its local commerce, that determines whether or not they so substantially burden interstate commerce that they violate the commercial clause of the Constitution. On the same day that the Northern Pacific Company installed its rates in Minnesota as prescribed by the order, it reduced its interstate rates. . . . These reductions were compelled by the necessary and direct effect of the operation of the order. Had they not been made, Superior could not have competed in business in Minnesota with Duluth, Fargo [and] Grand Forks; and Wahpeton could not have competed with Moorhead, East Grand Forks and Breckinridge, respectively; nor could Superior have transacted business successfully with Fargo, Grand Forks or Wahpeton."

It is impossible to make out from the report of the third decision, In Re Arkansas Rate Cases (May 3, 1911; 187 Fed. Rep. 290) what precisely, or even approximately, were the facts involved. Judge Sanborn's relentless and inexorable logic was not applied, and, perhaps, was not applicable. Nor was anything made of the bearing of the Kansas cases upon the question involved, whatever that question was. It is, however, clearly stated that the close economic relation between local and interstate rates does not, *as of necessity*, invalidate the attempt to regulate the local rates. Some authority, it is urged, must remain to the states, else for some questions there will be no authority at all. "If the state is without the power to regulate purely intrastate transportation, because it affects intrastate traffic indirectly, where is it vested?" Congress clearly has no such power. In this argument no appreciation is indicated of the fact that the choice does not lie within the rigid alternative between all authority and none. In reality, however, there are three possibilities: all, none, and *some*.

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upon the interstate portion of the traffic. And in many or most cases the attempt to secure through reduced rates the result indicated is impracticable, by reason of the fact that the weaker lines, whose rates are not over-high, cannot meet the lower rates at which the stronger lines can do business, and must, therefore, be deprived of all traffic for which the latter can compete.

Thus, in the existing legal situation, the state can reach the unearned increments in question only to the extent to which these may be reached through the general *ad valorem* property tax. It may indeed be true that few states have yet exhausted the possibilities of *ad valorem* taxation; that there is small occasion to pine for further power till that which exists has been exercised; and that tax-reform sentiment might for the present be content to secure a fair and consistent application of the *ad valorem* principle. But it still remains true that a one per cent tax on a franchise value amounts to the appropriation of only about one-fifth or one-fourth of the rent-earning power of the franchise or of its actual value. Under our law as at present declared, and under any probable declaration of that law, it must lie solely with the federal authority to make good the social claim to this particular fraction of the social estate.

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MARXISM VERSUS SOCIALISM. VI

X

IN Marx's map of life all the paths and all the byways led to the great social revolution; all the streams and all the currents were hurrying on to the great cataract, the cataclysm of the capitalist order of society. In his scheme of events Marx conceded us no chances whatever. No matter from what angle we might view our future, our doom was foreordained. The concentration of industry and agriculture, the socialization of all production, the massing of all wealth and capital in the hands of the few; the disappearance of the middle class, the steadily growing antagonism between the two remaining classes, the increasing misery of the proletariat and the rapid approach of a life and death struggle between labor and capital; the overwhelming legions of the proletariat and the dwindling numbers of the capitalistic magnates—all these tendencies were making socialism inevitable. In this reasoning there seemed to be no break or flaw; every link in the chain was forged securely; and, with the faith that Marx had in the tendencies that he described, the social revolution and the complete triumph of socialism seemed equally assured.

Independently of all these tendencies, however, seeds of corruption were disintegrating our social fabric, the walls of our city were shaking, and they were to fall and crumble before new life was to spring up on their ruins. Let me quote again from the *Communist Manifesto*:

> Modern bourgeois society with its relations of production, of exchange and of property, a society that has conjured up such gigantic means of production and of exchange, is like the sorcerer, who is no longer able to control the powers of the nether world whom he has called up by his spells . . . . It is enough to mention the commercial crises that by

[1] For earlier parts of this study see POLITICAL SCIENCE QUARTERLY, vol. xxiii (1908), pp. 193–219, 652–689; vol. xxiv (1909), pp. 236–268, 641–666; and vol. xxv (1910), pp. 393–419.

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their periodical return put on its trial, each time more threateningly, the existence of the entire bourgeois society . . . . In these crises there breaks out an epidemic that, in all earlier epochs, would have seemed an absurdity—the epidemic of overproduction. Society suddenly finds itself put back into a state of momentary barbarism; it appears as if a famine, a universal war of devastation had cut off the supply of every means of subsistence; industry and commerce seem to be destroyed; and why? Because there is too much civilization; too much means of subsistence, too much industry, too much commerce. The productive forces at the disposal of society no longer tend to further the development of the conditions of bourgeois property; on the contrary, they have become too powerful for the conditions, by which they are fettered . . . . The conditions of bourgeois society are too narrow to comprise the wealth created by them. And how does the bourgeoisie get over these crises? On the one hand by enforced destruction of a mass of productive forces; on the other, by the conquest of new markets and by the more thorough exploitation of the old ones. That is to say, by paving the way for more extensive and more destructive crises, and by diminishing the means whereby crises are prevented.[1]

The anarchy of production in our competitive system is bound to destroy the whole system, With striking vividness Engels pictured to us, in his earliest as well as in his latest writings, this growing revolt of the productive forces against the forms of production. The idea he got either from Fourier or from Simonde de Sismondi, whose master mind anticipated this theory in many details.[2] But whatever may be the genealogy of the theory of crises, the fact remains that as early as 1844 and 1845, both in his book on the *Situation of the Laboring Class in England* and in his speech at the conferences on communism at Elberfeld, Engels portrayed the steeplechase of competitive industry that leads invariably and inevitably to crises of overpro-

[1] Marx and Engels, Manifesto of the Communist Party (Chicago, Charles H. Kerr and Company), pp. 21, 22.

[2] Both the overproduction and underconsumption sides of the theory, the conquest of new markets as a means of overcoming commercial depression; the increasing magnitude of each recurring crisis—these things had been pointed out already in the twenties by one of the greatest and most neglected of economists, Sismondi. *Cf.* his Nouveaux principes *etc.*, pp. 329, 361, 372.

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duction. The manufacturer, Engels declared in 1845, does not know the consumer or his needs; he manufactures not knowing where his product will be shipped, nor does he know how much his foreign competitors are manufacturing for the same market; he is manufacturing blindly; and his sole consolation is that his competitors are no better informed and have to act in the same way.[1] The obvious result of such anarchy in production is overproduction and the commercial crisis. With the extension of industry the magnitude of the crises and the misery of the unemployed increase. And as planless competitive production inevitably leads to crises, so, and with equal certainty, the existing capitalist organization will produce the social revolution. This is as certain as a mathematical deduction from axiomatic premises.[2]

In Engels's "Anti-Dühring" (reprinted in his *Socialism Utopian and Scientific*), these views are further elaborated:

The enormous expansive force of modern industry, compared with which that of gases is mere child's play, appears to us now as a *necessity* for expansion, both qualitative and quantitative, that laughs at all resistance. Such resistance is offered by consumption, by sales, by the markets for the products of modern industry. But the capacity for extension, extensive and intensive, of the markets, is primarily governed by quite different laws, that work much less energetically. The extension of the markets cannot keep pace with extension of production, the collisions become periodic.[3]

Here we have a precise theoretical statement of the Marx-

[1] "Er weiss von dem allem nichts, er fabriciert wie seine Concurrenten, ins Blaue hinein, und tröstet sich damit, dass die Anderen dies eben auch thun müssen." Engels speech in Elberfeld, reported in Rheinische Jahrbücher für gesellschaftliche Reform (Hermann Prittman, Darmstadt, 1845), vol. i, pp. 47, 48.

[2] "Sie sehen also, m. H., auch im Einzelnen das bestätigt, was ich am Anfange allegemein, von der Concurrenz überhaupt ausgehend, entwickelte, nämlich, dass die unvermeidliche Folge unserer bestehenden sozialen Verhältnisse unter allen Bedingungen und in allen Fällen eine *soziale Revolution* sein wird. Mit derselben Sicherheit, mit der wir aus gegebenen mathematischen Grundsätzen einen neuen Satz entwickeln können, mit derselben Sicherheit können wir aus den bestehenden ökonomischen Verhältnissen und den Principien der National-Ökonomie auf eine bevorstehende soziale Revolution schliessen." *Ibia.* pp. 78, 79.

[3] Engels, Socialism Utopian and Scientific (New York, 1901), p. 41.

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Engels conception of crises; and it is this theory that we find in Marx's *Capital*. The crises of overproduction are not simply Fourier's "plethoric" crises";[1] they are manifestations of the contradiction inherent in capitalist production. Capitalist production must expand more rapidly than capitalist distribution can permit consumption to expand, and the disproportion constantly increases by reason of the steady increase of the productivity of human labor. Hence overproduction and resulting liquidation—an industrial cycle that ends where it began, in the ditch of the commercial crisis. How fundamental this conception is to Marx is shown in his theory of wages and of the industrial reserve army. Expansion and contraction of production are taken for granted as the characteristic features of capitalistic production.

There has been considerable discussion of the question whether Marx's theory of crises is not identical with Rodbertus's underconsumption theory. In the second and third volumes of *Capital* we find some apparently contradictory statements. While the second volume ridicules the underconsumption theorists and the followers of Rodbertus,[2] the third volume

[1] Engels writes: "And the character of these crises is so clearly defined, that Fourier hit all of them off when he described the first as 'crise plethorique,' a crisis from plethora." Socialism Utopian and Scientific, p. 42.

[2] "Es ist eine Tautologie zu sagen, dass die Krisen aus Mangel an zahlungsfähiger Konsumtion oder an zahlungsfähigen Konsumenten hervorgehen. Andere Konsumarten, als zahlende, kennt das kapitalistische System nicht, ausgenommen die *sub forma pauperis* oder die des 'Spitzbuben.' Dass Waaren unverkäuflich sind, heisst nichts, als dass sich keine zahlungsfähigen Käufer für sie fanden, also Konsumenten. . . . Will man aber dieser Tautologie einen Schein tiefer Begründung dadurch geben, dass man sagt, die Arbeiterclasse erhalte einen zu geringen Theil ihres eigenen Produkts, und dem Uebelstand werde mithin abgeholfen, sobald sie grösseren Antheil davon empfängt, ihr Arbeitslohn folglich wächst, so ist nur zu bemerken, dass die Krisen jedesmal gerade vorbereitet werden durch eine Periode, worin der Arbeitslohn allgemein steigt und die Arbeiterclasse realiter grösseren Antheil an dem für Konsumtion bestimmten Theil des jährlichen Produkts erhält. Jene Periode müsste—von dem Gesichtspunkt dieser Ritter vom gesundem und 'einfachen' (!) Menschenverstand—umgekehrt die Krise entfernen. Es scheint also, dass die kapitalistische Produktion vom guten oder bösen Willen unabhängige Bedingungen einschliesst, die jene relative Prosperität der Arbeiterclasse nur momentan zulassen und zwar immer nur als Sturmvogel einer Krise. (Ad notam für etwaige Anhänger der Rodbertus'schen Krisentheorie. F. Engels.)" Marx, Das Kapital, vol. ii (second ed., Hamburg, 1893), pp. 335, 386.

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emphasizes, as the basic reason for all crises, limited consumption, due to poverty of the masses, and the tendency of capitalist production to develop its productive forces as if the capacity of the consumer was not limited by poverty.[1] Bernstein[2] tries to explain the difference in these statements by the lapse of time, the interval of thirteen or fourteen years, between the writing of the second and third volumes of the *Capital*. But he overlooks a note in the second volume which contains practically the same statement as that cited above from the third volume.[3] In so far as there is a contradiction, it already existed in the two statements of the second volume. If, however, we lay undue stress on faulty or inadequate explanations advanced by Marx, we shall fail to comprehend his central idea, which is obvious and clear: the antithesis between the almost unlimited expansive force of production and the limited power of consumption. Unequal distribution, poverty and limited power of consumption were quite as marked in past ages as in the capitalist era, but in past ages the forces of production were also very limited. What characterizes capitalist production is the altogether disproportionate development of the forces of production as well as the accumulation of capital that yearns for further accumulation and therefore refuses to remain idle. Hence the constantly growing overproduction, that is bound to become chronic

[1] "Wie aber die Dinge liegen, hängt der Ersatz der in der Produktion angelegten Kapitale grossentheils ab von der Konsumtionsfähigkeit der nicht productiven Klassen; während die Konsumtionsfähigkeit der Arbeiter teils durch die Gesetze des Arbeitslohns, teils dadurch beschränkt ist, dass sie nur solange angewandt werden, als sie mit Profit für die Kapitalistenklasse angewandt werden können. Der letzte Grund aller wirklichen Krisen bleibt immer die Armuth und Konsumtionsbeschränkung der Massen gegenüber dem Trieb der kapitalistischen Produktion, die Produktivkräfte so zu entwickeln, als ob nur die absolute Konsumtionsfähigkeit der Gesellschaft ihre Grenze bilde." Marx, Das Kapital, vol. iii, part ii (Hamburg, 1894), p. 21.

[2] Evolutionary Socialism (New York, 1909), p. 75.

[3] "Die Epochen, worin die kapitalistische Produktion alle ihre Potenzen anstrengt, erweisen sich regelässig als Epochen der Ueberproduktion; weil die Produktionspotenzen nie soweit angewandt werden können, dass dadurch mehr Werth nicht nur producirt, sondern realisiert werden kann; der Verkauf der Waaren, die Realisation des Waarenkapitals, also auch des Mehrwerths, ist aber begrenzt, nicht durch die konsumtiven Bedürfnisse der Gesellschaft überhaupt, sondern durch die konsumtiven Bedurfnisse einer Gesellschaft, wovon die grosse Mehrzahl stets arm ist und stets arm bleiben muss." Marx, Das Kapital, vol. ii, p. 289.

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and incurable and to lead to the cataclysm of our present mode of production. It is a striking example of Marx's revolutionary dialectics, which

> includes in its comprehension an affirmative recognition of the existing state of things, at the same time also the recognition of the negation of that state, of its inevitable breaking up; because it regards every historically developed social form as in fluid movement, and therefore takes into account its transient nature not less than its momentary existence; because it lets nothing impose upon it, and is in its essence critical and revolutionary. The contradictions inherent in the movement of capitalist society impress themselves upon the practical bourgeois most strikingly in the changes of the periodic cycle, through which modern industry runs, and whose crowning point is the universal crisis.[1]

In their faith in the approaching *dies irae* Marx and his followers did not differ from the Second Adventists. Nearly every commercial depression since 1850 was heralded by them as the beginning of the end of capitalism. If they did not, like the Millerites, attire themselves in white night-robes to meet the coming of the Day, it was because their ritual was different. They did notify the proletarians of all lands to "get ready." In 1896 the International Socialist Congress passed the following resolution:

> The economic and industrial development is going on with such rapidity that a crisis may occur within a comparatively short time. The Congress, therefore, impresses upon the proletariat of all countries the imperative necessity of learning, as class-conscious citizens, how to administer the business of their respective countries for the common good.

The socialist literature, both popular and scientific, has constantly dwelt on the coming collapse of the capitalist mode of production, for which they always had conclusive proofs. Some of these writings are both brilliant and eloquent, especially those

[1] Marx, Capital (fourth English ed., 1891), pp. xxx, xxxi.

[2] Bernstein, Evolutionary Socialism, p. 80.

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of Kautsky.[1] The fact, however, remains that the imminent cataclysm which the Marxists have been prophesying for sixty odd years has failed to occur; and it really seems time for them to explain why it is still postponed. As often as the Millerites were disappointed, they revised their exegeses of Daniel and of Revelation.

Marx's theory of crises has the faults that characterize all

[1] Kautsky reproduces Marx's theory so clearly and in so popular a form that I venture to quote some passages:

"The revolution in the machinery of production goes on uninterrupted; the fields that it invades are ever more numerous. Year after year new branches of industry are captured by capitalist large production, and consequently the productivity of labor grows incessantly, and at an ever increasing rate. Simultaneously with this the accumulation of new capital proceeds without interruption. The intenser the exploitation of the single laborer and the larger the number of the exploited laborers, the larger also grows the quantity of the surplus and the mass of wealth that the capitalist class can lay by and apply as capital. The capitalist system, therefore, cannot remain stationary; its constant expansion and the constant expansion of its market are a vital necessity to it; to stand still is death. While formerly, in the days of handicraft and small farming, the country produced year in and year out a quantity of wealth, which, as a rule, increased only with the increase of population, the capitalist system, on the contrary, is from the start dependent on an incessant increase of production; every stoppage indicates a social malady which grows more painful the longer it lasts. Thus together with the periodical incentives to increase of production brought on by the periodical extensions of the market, there is a permanent pressure in this direction inherent in the capitalist system of production itself. This pressure, instead of being brought on by the extension of the market, compels the latter to be pushed constantly further. . . . The wonderful development of transportation renders from year to year a completer exploitation of the market possible; but this tendency is counteracted by the circumstance that the market steadily undergoes a change in those very countries whose population has reached a certain degree of civilization. Everywhere the introduction of the goods of capitalist large production extinguishes the domestic system of small production and transforms the industrial and agricultural laborers into proletarians. This produces two important results in all the markets that are counted upon to absorb the surplus products of capitalist industry: first, it lowers the purchasing power of the population and thereby counteracts the effect of the extension of the market; and, secondly, and more important, it lays there the foundation for the capitalist system of production by calling into existence a proletarian class. Thus capitalist large production digs its own grave. From a certain point onward in its development every new extension of the market means the rising of a new competitor. . . . For some time past the extension of the markets has not kept pace with the requirements of capitalist production. The latter is, consequently, more and more hampered and finds it increasingly difficult to develop fully the productive powers that it possesses. The intervals of prosperity become shorter; the length of the crises ever longer." Kautsky, The Class Struggle (Chicago, 1910), pp. 82–85.

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Marxian theories. On the basis of facts not always rightly interpreted, tendencies of social life are formulated. Each of these tendencies, invariably destructive to the general welfare, is expected to persist and to reach its highest potency unchecked and untempered. Society is not expected to protect itself, to adjust itself or to meet situations as they arise—a childish conception of historical life. Life is full of recuperative powers; it has more antidotes than there are poisons; it has counter-tendencies for every tendency; or, as our genial Dr. Crothers puts it:

> There is one tendency which all tendencies have in common, that is to develop counter-tendencies. There is, for example, a tendency on the part of the gypsy-moth caterpillar to destroy utterly the forests of the United States. But were I addressing a thoughtful company of these caterpillars I should urge them to look upon their own future with modest self-distrust. However well their programme looks upon paper, it cannot be carried out without opposition. Long before the last tree has been vanquished the last of the gypsy-moth may be fighting for its life against the enemies it has made.[1]

In the first place, the fundamental assumption that capitalist production cannot get along without foreign markets, that the conquest of new and further exploitation of old foreign markets is the capitalist method of overcoming crises—all these sweeping statements are unwarranted. Take Germany as an illustration. In spite of the colossal development of German industry, the domestic market is absorbing a growing proportion of the sum total of its production. In the period 1880–1900, notwithstanding the enormous extension of Germany's iron and coal industry, the export of iron sank from 29.3 to 7.8 per cent of the total production, and the export of coal from 11 to 7.3 per cent.[2]

Further, it is admitted by Engels himself that crises are not increasing in frequency or in magnitude, but are far less dis-

[1] Crothers, By the Christmas Fire, pp. 61, 62.

[2] Tugan-Baranowsky, Theoretische Grundlagen des Marxismus (1905), pp. 231, 232. *Cf.* Sombart, Die deutsche Volkswirthschaft im neunzehnten Jahrhundert (1903), pp. 430, 431.

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turbing than they were half a century ago. Even in the third volume of *Capital*, which still cherishes the roseate hope of a "*Weltkrach*," we are told that the modern development of the international market has abolished most of the old incubators of crises and has generally diminished their danger—a most important admission, which really nullifies the whole prophetic theory as originally presented by Marx and Engels.[1] And in his *Socialism Utopian and Scientific*, in which the cataclysm plays none too modest a part, Engels shows that he is quite conscious of the fact that overproduction can be checked and output regulated without any preceding social revolution. He tells us how producers on a large scale in any given country unite in a pool for the purpose of regulating production, how they determine the total amount of the output and parcel it out among themselves at prices fixed beforehand. He tells us, further, that if pools of this kind, gentlemen's agreements *etc.* show tendencies of breaking up, a still greater concentration of association develops. The bulk of a given industry is then turned into a trust, a gigantic joint-stock company.

In this trust, freedom of competition changes into its very opposite—into monopoly; and the production without any definite plan of capitalist society capitulates to the production upon a definite plan of the invading socialist society. Certainly this is so far still to the benefit and advantage of the capitalists. But in this case the exploitation is so palpable that it must break down. No nation will put up with production conducted by trusts, with so barefaced an exploitation of the community by a small band of dividend-mongers.[2]

[1] "Die kolossale Ausdehnung der Verkehrsmittel—oceanische Dampfschiffe, Eisenbahnen, elektrische Telegraphen, Suezkanal—hat den Weltmarkt erst wirklich hergestellt. Dem früher die Industrie monopolisirenden England sind eine Reihe konkurrirender Industrieländer zur Seite getreten; der Anlage des überschussigen europäischen Kapitals sind in allen Weltteilen unendlich grössere und mannigfaltigere Gebiete eröffnet, so dass es sich weit mehr verteilt, und lokale Ueberspekulation leichter überwunden wird. *Durch alles dies sind die meisten alten Krisenheerde und Gelegenheiten zur Krisenbildung beseitigt oder stark abgeschwächt.* Daneben weicht die Konkurrenz im innern Markt zurück von den Kartellen und Trusts, während sie auf dem äusseren Markt beschränkt wird durch die Schutzzölle womit ausser England alle grosse Industrieländer sich umgeben." Marx, Kapital, vol. iii, part ii, p. 27, Engels's note.

[2] Engels, Socialism Utopian and Scientific, p. 44.

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Granting for argument's sake that trusts lead to socialism, what has happened to the elaborate Marx-Engels theory of crises and to the inevitable cataclysm, accompanied by the trumpets of the social revolution? What has happened to the inner contradiction between the ever-expanding forces of production and the limitations of consumption? Have not all these elaborate, even if unfounded, theories been abandoned, exchanged for the simple faith that trusts may usher in socialism? Is not this a complete change of program? What has become of universal crisis, complete breakdown of capitalist production, social revolution, dictatorship of the proletariat, general expropriation, and blood and thunder all along the line?

Every tendency that Marx and Engels confided in has been checked, retarded, deflected or reversed. Industry has not concentrated to any such extent as the fathers of scientific socialism expected. Agriculture shows tendencies towards decentralization. The concentration of wealth and proletarization of the middle class has proved a fable; the middle incomes are steadily growing. The increasing misery of the proletariat is abandoned, in view of facts that prove the opposite; the class-struggle, instead of increasing, is as a whole diminishing. The commercial crises, that were to increase till they destroyed like an earthquake our whole industrial organization, are admittedly abating their fury. The argument is being shifted back to concentration of industry and agriculture, a subject that I have discussed in chapter iv of the present study.[1]

Theories of crises more tenable than the Marxian cataclysmic theory have been elaborated,[2] but they lie outside of the present inquiry. What interests us is the fact that it is not our industrial society but the Marxian theory that has broken down. Among the American socialists there seems to be a tendency to forget

[1] POLITICAL SCIENCE QUARTERLY, vol. xxiii, pp. 655–670.

[2] Tugan-Baranowski, Theoretische Grundlagen des Marxismus (Leipzig, 1905), pp. 210 *et seq.* Bouniatian, Wirtschaftskrisen und Ueberkapitalisation (München, 1908), perhaps the best book on the subject. Tugan-Baranowski, Studien zur Theorie und Geschichte der Handelskrisen in England (Jena, 1901), pp. 1–37, 174–254. Lescure, Des Crises générales et périodiques de surproduction (1907), pp. 455 *et seq.*

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this theory. We are told by Miss Hughan that, according to Lucien Sanial, the acknowledged authority on crises among American socialists,

> Marx's theory was a valid explanation. . . of all crises until 1880. Since that time we have entered upon the stage of concentration in capitalism, where the cause of the crisis is no longer industrial but commercial and financial. The investigator must now seek for the factors which in the course of economic evolution have so developed as to modify the financial and commercial circumstances; he will then find only a partial and constantly less adequate explanation of each successive crisis in the overproduction theory of Marx.[1]

Another leader of American socialism, a member of the national committee, seems to have abandoned Marx to the point of stating that "each and every panic that has occurred has not the same basis."[2]

The Marxian theory of crises as originally formulated, with its announcement of the inherent doom of the capitalist organization of society, might therefore properly be declared to be both obsolete and untenable. The social revolution with the dictatorship of the proletariat, which was to follow or accompany the great crisis, still lingers in the minds of those who have long since abandoned all hope of the cataclysm. Let us therefore examine this social revolution.

XI

Few words have been so assiduously interpreted by the so-called Marxists as the word "revolution." Interpretation was not infrequently necessary. The conquest of political power through an armed uprising, preached openly, brought the agitator in continental Europe before the courts, under the charge of treason. In pleading his case he naturally tried to tone down the meaning of the word "revolution."[3]

In preaching revolution in a democracy like ours the agitator

[1] Hughan, The Present Status of Socialism in the United States (1911), chapter vii and *passim*. [2] *Ibid.*

[3] Hochverrats-Prozess wider Liebknecht, Bebel, Hepner (Berlin, 1894), pp. 675–679, 71, 457 *et seq.*

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is confronted with still greater difficulties—he is not listened to by intelligent people. In a democracy the will of the majority is supposed to rule. There can be, therefore, no occasion for a revolution, unless it be a revolution of a minority against the will of the majority. At present there is much criticism of the judiciary and even of the Constitution; but it comes in the main from an irritated minority. Legislative acts could not be vetoed by the courts if it were the determined will of the great majority of the people that the courts should not have that power. The fact is that the vast majority of people have greater confidence in the courts than they have in the legislative bodies. Whatever the legal theory may be, in a democracy the decisions of the courts can not in the long run antagonize the prevailing public sentiment. Revolutionary propaganda in this country and in England is therefore bound to fall on deaf ears.

Yet Marx laid great stress on the revolution. His socialism is international revolutionary socialism. It is its adherence to the revolutionary principle, its insistence upon the capture of political power, the dictatorship of the proletariat, the overthrow of the present economic organization of society, that gives it a peculiar stamp of its own. No matter, therefore, how much Marx may be sugarcoated, the word "revolution" cannot be stricken from the Marxian dictionary. The word may, of course, be used in various senses. There has been an industrial revolution, there have been revolutions even in fashions of hair-dressing. Marx often uses the word revolution in other senses than that attributed to it in politics; but in order to expurgate political revolution from his original doctrine it would be necessary to mutilate his writings beyond the possibility of recognition. It was not as an economist but as a theorist of revolution that Marx started. All his economic and philosophical inquiries were prosecuted to find reasons for the assumptions with which he started and proofs of the conclusions which he had already reached.

One might paraphrase Kant's: "Wie sind synthetische Urteile *a priori* möglich?" and ask: "How is a social revolution possible?" and one would have in a nutshell the real

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purpose of Marx's investigation. His single theories are instrumentalities, his many learned observations by-products, of the central operation of his mind. Back of his most abstract reasonings, his seemingly purely scientific considerations, there is a tremendous emotional appeal. It is not an ethical appeal, it is simply a statement that certain things which he profoundly desires will assuredly take place—a statement not subject to debate or discussion. Its finality is majestic. And whatever that appeal may be to us, for the countless, nameless legions of the proletariat there is honor, there is duty, there is promise, there is life! Is it life at its best and highest? is an idle question. It is life that meets death with a smile: "mourir en combattant." This treasure of the French Revolution became the heritage of the forties, and Marx's soul lived on it lavishly.

> With a deathless scorn in my dying breath,
> In my hand the sword still cherished;
> "Rebellion" still for my shout of death.[1]

Translate these lines of Freiligrath into better prose and one has Marx's valedictory. No matter what work of Marx's one reads, one will find there no attempt at a disguise. There is the vision of the great revolution, and toward it lies his course. Only after the great social revolution, that will abolish all classes and class-antagonisms, can social evolutions cease to be political revolutions. Until then the last word of social science will ever be: "Le combat ou la mort; la lutte sanguinaire ou le néant."[2] In the last number of the *Neue Rheinische Zeitung*[3] he urges revolutionary terrorism.[4] In other writings he tells us that "revolutions are the locomotives of history."[5]

[1] From Freiligrath's "Abschiedswort" on May 19, 1849, in the *Neue Rheinische Zeitung*, no. 301. The English version cited is by Ernest Jones. *Cf.* Spargo, Karl Marx (1910), p. 165, where the whole poem is quoted.

[2] Marx, Misère de la philosophie (Paris, 1847), p. 178.

[3] No. 301, May 19, 1849.

[4] For further quotations see Simkhovitch, Die krisis der Socialdemokratie. *Conrad's Jahrbücher*, vol. xvii (1899). *Cf.* also Hammacher, Das philosophisch-ökonomische System des Marxismus (Leipzig, 1909), pp. 91–94.

[5] Marx, Die Klassenkämpfe in Frankreich (Berlin, 1895), p. 90.

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True, a revolution is an act of destruction, it abolishes old relationships; but for that very reason "socialism without a revolution is impossible."[1] Revolution is the breath of the *Communist Manifesto*. Let the ruling classes tremble; the proletarians have nothing to lose but their chains. It is in revolution that all the theories of Marx's *Capital* converge. Its supreme moment is when "The knell of capitalist private property sounds. The expropriators are expropriated."[2]

It is thus a philosophy of revolution that Marx presents. In this philosophy of revolution, curiously enough, either the philosophy stamps the idea of a revolution as a feverish dream, or the revolution upsets the philosophy and makes it ridiculous. Marx, the founder of scientific socialism, the deadly critic of utopianism, is himself a revolutionary utopian; and it is his revolutionary utopia that has captured the masses and converted them to anti-utopian scientific socialism!

Let us take, for example, the dictatorship of the proletariat and its rôle in the social revolution.

> The proletariat will use its political supremacy to wrest, by degrees, all capital from the bourgeoisie, to centralise all instruments of production in the hands of the State, *i. e.* of the proletariat organized as the ruling class, and to increase the total of productive forces as rapidly as possible. Of course, in the beginning, this cannot be effected except by means of despotic inroads on the rights of property, and on the conditions of bourgeois production; by means of measures, therefore, which appear economically insufficient and untenable, but which, in the course of the movement, outstrip themselves, necessitate further inroads upon the old social order, and are unavoidable as means of entirely revolutionizing the mode of production.[3]

Babeuf or Blanqui might have written this passage; it would have been quite in keeping with their general point of view—that of conspiracy and forcible overthrow. They believed that the socialist commonwealth could be decreed at any time by the victorious proletariat; all that was required was political

[1] Marx und Engels, Literarischer Nachlass, vol. ii (1902) p. 59.

[2] Marx, Capital, vol. i (fourth English ed.), p. 789.

[3] Communist Manifesto, pp. 44, 45.

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power. How many a time did Marx and Engels declare such ideas to be dangerous utopias, that could lead to nothing but demoralization and disaster! Marx could not look upon them differently so long as he regarded his economic interpretation of history as the fundamental proposition of his doctrine. No dictatorial decrees of the victorious proletariat, no despotic measures, no concentrated action of all the guillotines in the world could centralize the instruments of production. Socialism is possible only when in the course of economic development all production has become concentrated and socialized. Hence Marx affirms: "No social order ever disappears before all productive forces for which there is room in it have been developed; and new higher relations of production never appear before the material conditions of their existence have matured in the womb of the old society."[1] What then can the dictatorship of the proletariat accomplish so long as production remains decentralized? The fabrication of a plan for a socialist commonwealth and its introduction through a successful overthrow Marx regarded as utopias, and he denounced the preaching of such doctrines as "empty, unconscientious play with propaganda." These are the words which Marx addressed to Weitling;[2] and yet Marx was himself guilty of that for which he reproached Weitling. It is true that Marx and Engels had learned a great deal from experience. The preface to the *Communist Manifesto* admitted that the Paris commune had taught them that "the working class cannot simply lay hold of the ready-made state machinery and wield it for its own purposes."[3]

There is no doubt whatever that the revolutionary element in

[1] Marx, A Contribution to the Critique of Political Economy (Stone's translation), p. 12.

[2] "Sagen Sie uns doch, Weitling, der Sie mit ihrer kommunistischen Propaganda so viel Geräusch in Deutschland gemacht und so viele Arbeiter angezogen haben . . . mit welchen Argumenten verteidigen Sie Ihre sozialrevolutionäre Agitation und worauf denken Sie dieselbe in Zukunft zu gründen? . . . Zumal in Deutschland sich an die Arbeiter zu wenden ohne streng wissenschaftliche Ideen und konkrete Lehre, sei gleichbedeutend mit einem leeren, gewissenslosen Spiel mit der Propaganda." *Die Neue Zeit*, vol. i (1883), p. 239.

[3] Communist Manifesto, p. 10.

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Marx's writings was, even if unconsciously, taken over bodily from the older revolutionary socialists like Blanqui. There is equally no doubt of its being in complete contradiction with the economic interpretation of history. A revolution could not create a socialist state; it could proclaim it only if economic development had already created it. How then could so thorough a thinker as Marx be so persistently guilty of so glaring a contradiction in theory?

I believe that the real explanation is in his "dialectics," in his Hegelian logic, or rather in the dialectic process that among the Hegelians took the place of logic. It was a mode of thinking that thought in nothing but revolutions, in negations of negations, in development through antitheses, in quantitative changes becoming qualitative. Antagonism was the driving force. Development consisted in constant rebellion of elements, in a series of cataclysms. To Engels this dialectic method was a fetish. Note for example the way in which he summed up the economic tendencies:

> The antagonism between socialized production and capitalist appropriation manifests itself as the antagonism of proletariat and bourgeoisie; it presents itself as an antagonism between the organization of production in the individual workshop and the anarchy of production in society generally. When the economic collision has reached its apogee you have the mode of production in rebellion against the mode of exchange, *i. e.*, the crisis and finally the social revolution.[1]

This social revolution changes even the quality of the law of history. There is no more economic or historical necessity. "It is the ascent of man from the kingdom of necessity to the kingdom of freedom."[2] Translated into philosophical language, this means that causality ceases!

This passage helps us to see how the economic interpretation of history was apparently reconciled with the revolutionary conception. The historical process is a process of constant change because of its inner antagonisms, which grow till they

[1] Engels, Socialism Utopian and Scientific (1901), pp. 35, 38, 42.

[2] *Ibid.* p. 53.

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overcome each other by force, forming new and higher elements which in their turn confront new and growing antagonisms—and so on indefinitely. The greater the antagonism, the nearer is the revolution. Marx's belief therefore was: the worse the better. Hence his dislike for reforms, for ameliorations that weaken antagonisms. The closing sentences in his speech on free trade strikingly illustrate this viewpoint. "Generally speaking," says Marx, "the free trade system is destructive. It breaks up old nationalities and carries the antagonism between proletariat and bourgeoisie to the uttermost point. In a word, the system of commercial freedom hastens the social revolution. In this revolutionary sense alone, gentlemen, I am in favor of free trade."[1] But with or without free trade, the revolution is inevitable—and why? Because society is divided into antagonistic classes. "The antagonism between the proletariat and the bourgeoisie is a struggle between class and class, a struggle which carried to its highest expression is a complete revolution."[2]

Orthodox Marxists adhere to the revolutionary and cataclysmic doctrine. Kautsky, after giving us various analogies from natural history and depicting the act of birth as a revolution and catastrophe, ends by affirming "that as each animal creature must at one time go through a catastrophe in order to reach a higher stage of development (the act of birth or the breaking of a shell), so society can only be raised to a higher stage of development through a catastrophe."[3] Dr. Luxemburg tells us that without the cataclysm of capitalism (*i. e.* the final crisis and social revolution) the expropriation of the captalist class is impossible. The cataclysm, therefore, is the cornerstone of scientific socialism; with its removal there is nothing left of socialism.[4] This is quite true, but it only proves

[1] Reprinted as appendix iii in the English edition of Marx's Poverty of Philosophy (London, 1900), p. 195.

[2] *Ibid.* p. 159.

[3] Kautsky, The Social Revolution (Chicago, 1905), p. 20.

[4] "Da aber der Zusammenbruch der bürgerlichen Gesellschaft ein Eckstein des wissenschaftlichen Sozialismus ist, so musste die Entfernung dieses Ecksteins logisch zum Zusammenbruche der ganzen sozialistischen Auffassung . . . führen. . . . Ohne Zusammenbruch des Kapitalismus ist die Expropriation der Kapitalistenklasse unmöglich." Luxemburg, Sozialreform oder Revolution (Leipzig, 1899) p. 56.

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that socialism, scientific or otherwise, has really no leg left to stand on. Let us examine its predicament.

We have seen that the hoped-for universal crisis, the collapse of capitalist production, might as well be eliminated. The untenability of this theory is admitted. The cataclysm is therefore reduced to the operation of the social revolution. Here again, however, Marx becomes involved in no end of difficulties due to inner contradictions. The economic interpretation of history and the social revolution as an organizer of a new system of production cannot live together in the same house. The economic development is the basis; law, politics, ideologies are superstructures. *The basis cannot be changed by the superstructures; on the contrary, the latter have to adjust themselves to the basis.* This economic basis may present a socialized and absolutely concentrated mode of production; the superstructure —the old law—may then be adjusted to the new economic requirements. Marx told us that the tendencies of existing society lead inevitably to concentration, socialization, proletarization *etc.*, which are forming a new economic basis and will therefore produce a new legal superstructure—a socialist commonwealth. But we have seen that Marx was mistaken in his view of tendencies. The economic basis for a socialist state does not exist, and there is no evidence that it ever will exist. On the other hand, revolutionary ideologies, bloody street fights, can never create a new economic basis.

And now let us look into the contradictions of the so-called dialectics of Marx and Engels. Granted that there is nothing fixed, nothing constant but the constancy of change. Marx assumes this; yet he is constantly operating with logical concepts, which are in their very nature unchangeable, inflexible, permanent and constant. If a is a, it can not be $a + c$ or $a - c$. Yet in the historical process that presupposes constant change: a cannot remain the same a as it was at the start. To make this concrete: Marx is dealing with classes, tendencies *etc.* But from his own viewpoint his classes cannot help changing in character. The same thing is true about all his concepts, whether they are "crisis," "capitalism," "concentration" or "revolution." Yet while the historical process is battering,

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changing or even destroying the inner content of all these concepts, the Marxian socialist operates with them as with absolute and unchanging entities and works out "scientifically," by negation of the negation, our distant future![1]

Not only has time changed the meaning of the concepts with which Marx and Engels operated, but the authors of revolutionary socialism themselves underwent a change and admitted that history had convicted them of error. Marx had little respect in his later years for *Revolutionsspielerei*;[2] and Engels in 1895 described his and Marx's early revolutionary conception as illusions and admitted that history not only had proved them to be wrong but also had changed all the conditions of class struggle. If the victory of the proletariat in street fights was of rare occurrence in the past, it has, under modern conditions, with the present military technique, with railroads and telegraphs, practically no chance whatever.[3] Thus even the last hope, the revolutionary hope, is laid at rest.

VLADIMIR G. SIMKHOVITCH.

[1] Any one interested in the philosophical and logical aspects of the Marxian theory of development should not fail to read Peter von Struve, "Die Marxische Theorie der sozialen Entwicklung," in Braun's *Archiv für soziale Gesetzgebung und Statistik*, vol. xiv (1899), pp. 658–704. Also Hammacher, Das philosophisch-ökonomische System des Marxismus (Leipzig, 1909), and Untermann, Die logischen Mängel des engeren Marxismus (München, 1910).

[2] "Der gewaltsame Niederschlag einer Revolution lässt in den Köpfen ihrer Mitspieler, namentlich der vom heimischen Schauplatz ins Exil geschleuderten, eine Erschütterung zurück, welche selbst tüchtige Persönlichkeiten für kürzere oder längere Zeit sozusagen unzurechnungsfähig macht. Sie können sich nicht in den Gang der Geschichte finden, sie wollen nicht einsehen, dass sich die Form der Bewegung verändert hat. Daher Konspirations- und Revolutionsspielerei, gleich kompromittierlich für sie selbst und deren Sache, in deren Dienst sie stehen." Marx, Nachwort zu den Enthüllungen über den Kommunisten-Prozess zu Köln (Hottingen, Zurich, 1885), p. 72. Marx wrote the above sentences apropos of Willich, but the statement is true of Marx himself.

[3] "Die Geschichte hat uns Unrecht gegeben, hat unsere damalige Ansicht als eine Illusion enthüllt. Sie ist noch weiter gegangen; sie hat nicht nur unseren damaligen Irrtum zerstört, sie hat auch die Bedingungen total umgewälzt, unter denen das Proletariat zu kämpfen hat." Engels, Einleitung zu Karl Marx's Die Klassenkämpfe in Frankreich, 1848–1850 (Berlin, 1895), p. 6. "Die Ironie der Weltgeschichte stellt Alles auf den Kopf. Wir, die 'Revolutionäre,' die 'Umstürzler,' wir gedeihen weit besser bei gesetzlichen Mitteln als bei ungesetzlichen und dem Umsturz." *Ibid.* p. 17.

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THE SOCIAL AND ECONOMIC PROBLEMS OF MODERN SPAIN

TWO recent premiers of Spain have expressed the belief that the Spanish nation is in the clutches of a deadly disease and that the only hope of recovery lies in the quick application of the surgeon's knife to cut away the power of the Roman Catholic church. It appears that Señor Canalejas, the chief of the present cabinet, intends to be the surgeon. He has discarded diplomacy with the Vatican—owing, his followers assert, to the shuffling and delays of the papal secretary of state—and is proceeding to deal rigorously with the church on the assumption that the state is sovereign in matters not purely religious. Projects for various pieces of anti-clerical legislation are now on foot. The minister of public instruction has introduced a bill which goes so far as to declare that state education shall be absolutely free and to forbid the clergy to influence it in any way. Agitation has been started to make marriage merely a civil contract. Great mass meetings have been organized by the supporters of the cabinet and by its opponents, but the outcome of the struggle between the Radical cabinet and the church is yet in the future. Most liberal Roman Catholics seem to agree that there should be some modification of the obsolete concordat of 1851, which regulates the relations between Spain and the Vatican; and, apparently, unless the Vatican yields to demands for moderate reforms, a complete separation of church and state may be carried through in a few years.

Even if this should take place, however, it could hardly cure the evils which are sapping the vitality of Spain. The outbreak in Barcelona during July, 1909, attracted attention to the underlying causes of social unrest, but the anti-clerical agitation has tended to obscure them. The nation suffers most from economic evils, although these are complicated and intensified by political and religious difficulties. The Spaniards are a patient and long-suffering people, but for several years they have been

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feeling more and more keenly the misery caused by an enormous increase in the cost of living. The lower middle class, especially civil servants, petty politicians, army officers of the lower ranks and country priests, all suffer, almost as much as the proletariat; but as this class has played no part in the social movements of the last sixty years, its hardships attract little attention.

In the industrial proletariat evidences of social misery are more tangible. Spanish industry is poorly developed and is confined largely to a few provinces and cities. Only seventy-five out of every thousand of the whole population are employed in industry, while fourteen and seven per thousand are engaged respectively in commerce and transportation and thirteen per thousand are in the learned professions. Two regions, Catalonia in the Northeast and the Basque provinces in the North, with their centers at Barcelona and Bilbao, contain nearly half of the industrial population of Spain. The position of the workmen in these sections is fairly representative of the position of this class in the whole country. Official statistics and the studies of the Institute of Social Reforms at Madrid show that during the seventy-five years from 1827 to 1902 there was an average increase of 216 per cent in the cost of articles of prime necessity. Since 1902 the prices of bread and wine have decreased slightly, but in the cost of other necessities there has been an average increase of over 19 per cent. During the same time rents have increased enormously in most industrial centers. On the other hand, a leading writer asserts that the average increase in wages has been only 15 per cent from 1827 to 1902.[1] Opinions vary, owing to the difficulty of securing adequate statistics, but it is clear that wages have not increased in proportion to the cost of living. In Catalonia the average wage of the industrial workman is from 3.50 to four pesetas[2] for a working day of ten to eleven hours. The best paid men get only five pesetas a day. The women seldom get over 2.50

[1] J. J. Morato, in *Heraldo de Madrid*, 1903.

[2] A peseta is nominally worth the same as a French franc, *i. e.* about 19.3 cents; but actually its value is somewhat less. The rate of exchange sometimes fluctuates from as low as 32 pesetas to as high as 37 pesetas to the pound sterling. These fluctuations are a serious disturbance to business.

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pesetas, and are often compelled to work fourteen or fifteen hours a day. In Barcelona the budget of a frugal workman's family of four persons shows an expenditure of 5.56 pesetas a day for necessary food only.[1] Evidently the wages of both husband and wife working all the time hardly suffice to support the family. Moreover, in most factories in Barcelona, the conditions of work are very unhygienic and dangerous. The natural result is that strikes and mob violence are frequent. Barcelona is one of the chief centers of the Spanish anarchists. Bilbao, the chief city of the Basque provinces, is, on the other hand, the center of Spanish socialism. In this region there is some manufacturing and a great deal of mining. About 11,400 workmen are employed in Bilbao and about 13,000 miners in the province of Viscaya (Biscay). The average daily wage varies in the different trades from four pesetas a day for men in the steel mills to five and a half pesetas for masons and to six for weighers.[2] The average wage of the best paid miners is three and a half pesetas a day, the ordinary mine laborer receiving only three pesetas. The cost of the absolute necessities of life is such that an unmarried man cannot live on less than an average of 2.75 pesetas a day. Besides this the miners have a number of other grievances, and one can hardly be surprised to find that there were seventeen local and four general strikes in the Biscay mining region from 1890 to 1906. The demands formulated by the miners include, in addition to those usually made by the labor unions, some of those commonly emphasized by the Socialists.

In Madrid, which is not, like Barcelona or Bilbao, the center of an industrial or mining region but which nevertheless has a considerable artisan population, the average daily wage is about 3.50 pesetas. Some artisans get as much as 5.50, others as little as 2.30. Women's wages vary from one to 2.50 pesetas, while those of children average one peseta a day. About 30 per cent of all the artisans are women, and a large number of children under eighteen years of age are employed. On the basis

[1] A. Marvaud, La Question sociale en espagne (Paris, 1910), p. 427.

[2] *Ibid.* p. 112.

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of accurate statistics Señor Morato[1] has made a comparative table showing the income and expenditure of an ordinary artisan family in Madrid, Brussels and Paris. He shows that under exactly similar conditions of work and life the total annual expenses of such a family at Madrid would be over 23 per cent more than at Paris, while the income would be 68.33 per cent less than at Paris. The result would be that at Paris the artisan could save over half his income, while at Madrid he would have only 81.20 pesetas left at the end of the year. All the necessities of life are more expensive in Madrid. Food of a poorer quality costs 54 per cent more than at Paris and 89 per cent more than at Brussels, and rent is 100 per cent higher. The artisan of Madrid spends 75 per cent of his wages for food alone, and yet does not live so well as the French or Belgian artisan. The death rate is 27 per thousand in Madrid, while at Paris and Brussels it is under 17 and 16 per thousand respectively. Special conditions in Madrid help to make rents very high, but in other respects the condition of the artisan classes in Catalonia, Vizcaya and Madrid is typical of the rest of Spain. It is not surprising that anarchistic teachings are readily accepted in the Spanish cities. Napoleon I once said that the only revolution he really feared was one prompted by hunger. In such a revolution lies the real danger to the Spanish monarchy.

The tide of discontent may be stemmed, however, by efforts to eradicate the causes of social misery. Such attempts on the part of the employers and the employed have not as yet been important, although in Catalonia and the Basque provinces they have led to the establishment of a few savings banks, of funds for pensioning injured or worn-out employees and of hospitals for injured miners. Only a few workmen's dwellings have been built. Most of the workmen's associations are organized primarily for political and industrial conflicts, but there is an increasing number of mutual assistance societies which make loans and receive deposits. The Catholic Socialists have been active in this work, but chiefly for the benefit of the peasantry.

It is to the state that the Spanish people must look for im-

[1] *Heraldo de Madrid*, June 30, 1908.

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portant and effective work for social betterment; but until about 1900 the government gave few signs of awakening to the need of action. In 1883 a commission was appointed to investigate. After a very pessimistic report, its functions were somewhat enlarged, and finally, in 1903, the Institute of Social Reforms was created to study the labor problem and to publish the results, to organize a bureau of statistics, to inspect factories, and to advise the government of needed legislation. This institute is composed of thirty members: eighteen chosen by the government, six elected by the employers' organizations, and six by the laborers, both industrial and agricultural. Among its members are the most eminent sociologists of Spain, and it represents all shades of opinion, the Socialists being most numerous. In the seven years of its existence it has performed valuable service in the investigation of foreign legislation; it has secured the passage of a number of valuable laws for the protection of laborers; and it has a number of bills in preparation.[1] In 1900 an Employers' Liability Act was passed, which compares favorably with the legislation of other European states. In the same year a fairly good law was passed to protect women and children from excessive hours of labor, to keep children under ten years of age out of the factories and in general to regulate conditions of labor for women and children. In the case of adult males, no limitation has as yet been placed on the length of a day's labor in factories and mines, but a decree of 1902 has fixed eight hours as the normal day's labor in the government mines and industrial establishments, overtime to be paid for at one-eighth the daily wage per extra hour. In 1904, Sunday labor was prohibited by law, with reasonably flexible exceptions in cases of necessity. In 1906 the Civil Code was so amended as to prevent the seizure for debt of such wages, pensions or other incomes as do not exceed 2.50 pesetas a day. This, it was believed, would do much to free the Spanish artisan from the clutches of usurers.

In 1909 a law was passed dealing with strikes and lock-outs.

[1] A. Posada, "La Reforme Sociale en Espagne," in *La Revue Internationale de Sociologie*, 1907. L. Leger, "La Legislation du Travail en Espagne," in *Annales des Sciences Politiques*, 1906.

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This recognizes the right of both employers and employed to organize and to resort to the lock-out or to the strike; but it makes strike leaders responsible for illegal acts of strikers, and it requires notice of a strike to be given five to eight days in advance, in case it be likely to affect the food, heat, light or transportation of the public in any locality. According to a law of 1908 industrial tribunals are to be set up in the capital of each judicial district, composed of a president and six jurors, one-half to be chosen by the employers interested in any particular dispute from a list drawn up by the workmen and one-half by the employees from a list prepared by the employers. Another law of 1908 provides for the establishment of councils of conciliation and industrial arbitration, whose duty it is to examine the grievances before a strike begins and to try to settle the disputes. These councils, however, have no power to enforce the acceptance of the compromises which they find equitable.

Since 1764 there have been loan and savings banks in Spain, and in 1907 these had as many as 469,491 depositors; but up to 1908 there was no national institution which would enable a workman to assure himself of a pension when incapacitated for further work by reason of old age. A law of 1908 created a national institution of this sort, the *Instituto Nacional de Previsión*, which is to receive a permanent capital of 500,000 pesetas from the national treasury, an annual subsidy of at least 125,000 pesetas from the state budget, and enough more to pay its maintenance expenses, and is to have such additional resources as payments made by members and allied societies and the proceeds of gifts and legacies may afford.[1] This institution is to be governed by a president and board of directors, of whom seven are appointed by the minister of the interior from a list presented by the Institute of Social Reforms and seven by the minister in his discretion. The special function of the institution will be the provision of life pensions or annuities for members of the laboring classes by means of payment made by them or for them, and it will work in conjunction with certain exist-

[1] *Boletin del Instituto de Reformas Sociales*, March, 1908. Other details are explained in an official publication of the Institute of Social Reforms: Instituto Nacional de Previsión y sus relaciones con las entidades similares (Madrid, 1906).

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ing companies engaged in the same business. The maximum pension is to be 1500 pesetas; the minimum premium payment, 50 centimes. Unfortunately the misery of the Spanish proletariat is such that a considerable number of them can pay no premiums at all, and the scheme is therefore only a beginning, not a complete solution of the problem. Señor Canalejas, in a speech delivered in 1905, declared it the duty of the state to provide compulsory old-age pensions.

Other legislation proposed or under consideration aims to regulate the contract of apprenticeship and agreements between employees and their employers, to check public mendicancy, and to provide laborers with sanitary lodgings at moderate prices. There is an especially crying need for this last reform. Madrid has about 271 inhabitants to the hectare—Berlin has 189; Vienna, 131; London, only 128—and the death rate in Madrid is correspondingly high.

The legislation adopted or planned for the benefit of the industrial proletariat is excellent, but it alone cannot make them prosperous. The economic ties between the different classes of the population are so close that the misery of the peasant necessarily reacts on the industrial employee. Moreover, there are underlying causes of the high cost of living which labor legislation cannot reach. One of these is the protective tariff. The localization of Spanish industry has facilitated a conflict of interests between the industrial provinces, demanding a high protective tariff, and the agricultural regions, desiring free trade. The manufacturers in Catalonia and the Basque provinces won in the enactment of the tariff of 1892, which was revised upward in 1906. This tariff has undoubtedly forced up the prices of many articles of prime necessity, without bringing about any very rapid development of manufacturing. It has also made it very difficult to negotiate new and favorable commercial treaties with foreign states which import Spanish products, and this situation has affected the production for export of fruit, early vegetables, wine, oil and cork. The agriculturists demand that the tariff be further revised in their interests, although it now causes an increase of about six pesetas a hectolitre in the average price of wheat. Each interest cries loudly for more pro-

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tection for itself and less for the others, without regard to the sufferings of the artisans and peasants. Land owners and manufacturers alike seem selfish and almost wholly lacking in true public spirit.

Another most effective cause of the high prices is the backwardness of Spanish agriculture. Out of over 49,000,000 hectares of land in continental Spain only about 20,000,000 are productive at all, and of these only about 882,000 hectares are now irrigated. The ordinary yield of grain per hectare is only eight to ten hectolitres, while in France it is 15 to 20 hectolitres. Hence, to supply her people with food, Spain has to import each year 50,000,000 pesetas worth of grain, which pays a duty of about 40 per cent. Of the manufactured goods used a considerable part is still imported and pays heavy duties. If imports are not to exceed exports by a very large amount, minerals and agricultural products other than grain have to be exported, for Spain no longer has enormous treasures of gold and silver coming in from extensive colonial possessions as in past centuries. Wines are exported to a considerable extent, but the French market is closed to them by a high tariff. Therefore not all the product of Spanish vineyards is sold, and the price is kept low. The peninsula sells about 3,000,000 hectolitres of olive oil a year for 155,000,000 pesetas; but owing to antiquated methods of cultivation and of manufacture the product is inferior and brings less than one-half of the average price of the Italian oil and only about one-quarter of that of the French oil. English companies have long been engaged in removing iron ore and other mineral wealth from the peninsula without restriction, and thus the balance of trade has been maintained. The use of this ore in manufacturing has provided work for a considerable population in England, but comparatively little has been done to use the raw materials in Spain itself and thus to build up great industries.

It is clear that agriculture must be developed if Spain is to prosper. At present only about 29 per cent of the people are engaged in that staple industry, while 35 per cent of the population of Italy, 51 per cent of the German people, and 53 per cent of the French are agriculturists. In fact 60.1 per cent

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of the total population of Spain were non-producers in 1900 —an enormous dead weight for the nation to bear.

The lot of the farm laborer (*bracero*) is a hard one. In the South the average wage is 1.50 pesetas *per diem* of actual labor, and there are at most only 295 working days in the year. The poorest food procurable that will sustain a small family costs more than the average laborer can earn. In some sections he works fifteen or sixteen hours on the plains for one peseta, leaving his wife and children to exist in the villages as best they can. The plains of Andalusia, so famous for their fertility, are in reality only moderately productive in good years, and the extensive plateaus have a very low average production owing to the sudden changes of temperature and lack of rain.

Another very important cause of the misery of the southern peasantry is the concentration of large estates in the hands of comparatively few absentee landlords. Most of the land is owned by residents of Madrid or Seville who put overseers in charge. Estates of 3700 acres are fairly common in the province of Cordova, and in some provinces there are domains as large as 35,000 acres. The majority of these large owners have not the will, the intelligence or the capital necessary to get the best results from their estates, and the peasantry would be powerless to do better even if they had sufficient intelligence. The difficulties are quite similar to those experienced in Ireland.

In the north of Spain (Galicia, Asturias and part of León) the agrarian problem has a totally different aspect. Here the land is divided up among a multitude of poor laborers, theoretically their own masters, but practically bound by long-standing agreements, known as *foros*, to pay to the seigneur of the domain such heavy rents—often amounting with the land tax to 75 per cent of the annual yield—that the helpless farmers are scarcely able to live, though they eke out their incomes by working elsewhere, whenever possible, for 1.50 or two pesetas a day. An official investigation made in 1907 showed that a farm of 32 square meters (about 37 square yards) in Coruña had three owners: one who owned the land, another who owned the only chestnut tree on it, and a third who had the right to demand an annual payment of six eggs from the other

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two.[1] In the Cantabrian and other northern provinces, parcels of from half an acre to an acre and a half are very common, and there are many as small as 24 square rods. This subdivision is said to be partly the result of the inheritance rules borrowed from the Code Napoléon. The investigation showed also that often as many as forty or fifty separate parcels of land were cultivated by the same man. In the province of Vigo parcels of 12, 24 and 36 square yards of land are common, and one of two and a half acres is considered a great estate. Not only the land itself but also the rent charges are excessively divided, and the cultivator of the soil is almost always a "colonus" paying rent to the real owner. Nine-tenths of the land in Galicia has been sublet, and so the parcels have been still further diminished in size. In the past two centuries various ineffective attempts have been made to eradicate the evils due to the system of *foros*, but the peasants of the regions where they exist are still in misery.

Some features of each of these extremes—excessive concentration of land under a few owners and excessive subdivision of land—are to be found in the other regions of Spain. Without going into details, it may be stated with complete assurance that the condition of the peasantry is miserable almost everywhere. Though wages are not everywhere so low as in the South, in no region do they average over three pesetas a day and usually not over 2.50. Everywhere it is extremely difficult for the peasant to live and to support a family. Those who are not simple day-laborers are bound to the land and to its owner by an infinite variety of contracts, making them largely subject to petty tyranny from employers, from landowners and from the village *caciques* or local political bosses, and in some cases keeping them in a subjection not dissimilar to that of the feudal régime. Even the most arbitrary governments usually regard the peasantry as too safely conservative and docile to rise in open revolt; but in Spain semi-starvation is driving even the peasantry into occasional strikes. In 1892 and again in 1902 there were serious risings in Andalusia. It is true that these failed; but they may well presage others to come.

[1] Marvaud, *op. cit.* p. 157.

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In the past century various ministers have made fitful attempts to discover and to remove the obstacles to the prosperity of Spanish agriculture. In the last analysis the remedy for the ills of the nation is to make the soil produce an adequate food supply for the whole people. Investigating commissions have been appointed from time to time, and their recommendations, including those of 1905,[1] may be summarized under five headings: (1) favorable tariff arrangements, to protect agricultural products from foreign competition and to admit fertilizers, agricultural machinery *etc.* free of duty; (2) diminution of the heavy taxes which now rest upon the land and more equitable distribution of taxation; (3) extension of coöperative banks and educational opportunities; (4) division of the great estates of the South among a larger number of owners; (5) development of irrigation works, reforesting and road-building. These recommendations strike at most of the essential causes of the backward state of agriculture, but very few of them have been followed up by thorough legislation.

Numerous suggestions have been made for the development of peasant proprietorship, but the only project which has been accepted is that contained in the law of August 30, 1907. This proposes to distribute uncultivated public land to poor families who will work it, and allows municipalities and local communities to do the same with communal lands, provided they secure the consent of three-fourths of the co-proprietors and of the state. A central commission is to supervise the assignments. The grants are to be carefully safeguarded; and when the peasant occupier has cultivated the land properly for five years he becomes the owner, solely on the condition that he pays taxes to the state and, if his holding has been granted by a municipality, a two per cent commutable rent to the municipality. The allotment remains indivisible; the peasant may not sell it for ten years; nor may he mortgage it except to a coöperative association. The state is to provide each occupier with capital to the amount of 1500 pesetas to enable him to begin cultivation. This first attempt at interior colonization

[1] *Boletín del Instituto de Reformas Sociales*, II, 169.

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aims to remedy several of the gravest problems in the agrarian situation; but it has aroused unfavorable criticism, and it has not been in force long enough to make it possible to estimate the extent of its success. Another important reform, the compilation of a new tax register for the whole country, has long been under way, but is progressing with such extreme slowness that the date of its completion cannot be accurately predicted.

Nearly all sections of the country suffer from insufficient or irregular rainfall, and this is one of the greatest obstacles to agricultural prosperity. Only in the Northwest does the rainfall amount to 30 or 40 inches a year. In central Spain it averages about 23 inches, and in some parts of the South only 12, while the average in France is about 30 inches. The insufficient rains also vary greatly from season to season and from year to year. Through most of the year the river beds are nearly dry, but when the rains come the rivers become raging torrents, endangering lives and property. Two remedies for this have been suggested, namely, the extension of irrigation and reforesting. The subsoil of the peninsula is of undoubted richness and, if properly irrigated, would produce bountifully; but irrigation requires capital which private persons either do not possess or will not furnish. The government, however, could advantageously use its credit for the construction of great irrigation works and for reforesting on a large scale; for Spanish investors are inclined to distrust industrial securities and to favor government bonds, thus keeping the latter at an artificially high price. The government has long dallied with irrigation projects; and after the terrible agricultural crisis of 1903 in Andalusia an investigation of the possibilities of successful irrigation systems was set on foot, and engineers of high reputation were engaged to plan systems for Andalusia to rival that adopted for the Nile region under Lord Cromer's direction. Little more has actually been done; and the same is true of plans for reforesting. If the Spanish people can be made to realize that irrigation might increase the yield per acre about 560 per cent, that it would assure a crop every year where without it a full crop can be secured only about once in ten years, that it would enable a greater variety of crops to be

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grown, that it would tend strongly to intensify cultivation and to cause distribution of the land among a larger number of owners, and that it would obviate the need for importation of foreign grain, the fundamental economic problem with which Spain is confronted will be in a fair way to be solved. It is said that the existing systems, if properly managed, could provide water for nearly thirty per cent of the soil. The irrigation laws, however, are somewhat antiquated, their administration is not efficient, and the peasant sees little use for them. He is instinctively hostile to innovation, choosing to reap less and sell at a higher price rather than to run the chance of increased taxation on a larger crop. This Spanish conservatism is an obstacle to the attraction of large foreign capital to construct new irrigating systems and may hinder even the government, when it undertakes to do its duty to the nation.

A defect from which all parts of the realm suffer is the lack of means of communication, especially local roads. Here the government appears to be really at work. Roads are being planned and built at the joint expense of the provincial councils and the central government according to royal edicts of 1905 and 1908.

Until recently the state has done little to encourage coöperative associations of farmers; but in 1906 the Catholic Socialists secured the passage of a law authorizing on liberal terms the organization of such associations, to encourage improvements in agricultural methods and to help provide capital to pay for them. These associations enjoy various special privileges not possessed by ordinary banks, and by 1909 they had increased to over 450 in number.[1] Most of them make a specialty of purchasing chemical fertilizers, others sell produce for their members, and an important function of all is the provision of credit for the purchase of improved machinery. Lack of ready cash is one of the worst difficulties of the peasant farmer. In bad years he is at the mercy of unscrupulous money-lenders, who often charge 25 per cent interest and defraud him shamefully besides. Recently the state has begun to attack this problem,

[1] Le Soc, Sindicatos Agricolas, p. 29 (Saragossa, 1909).

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with which the coöperative societies were already dealing. In 1906, royal delegates were appointed to supervise the *pósitos*, ancient institutions combining the functions of banks and storage warehouses for grain. The delegates have tried to transform these archaic institutions into modern farmers' banks and to banish political corruption from their management; and they have achieved some success. Much may be hoped for, if this reörganization continues and if competent, honest administrators can be found, for these *pósitos* have capital, important legal and fiscal privileges and, above all, the strength of long tradition behind them. Thus Spain has the *pósitos*, the coöperative societies organized by the Catholic Socialists and a number of private banks which are helping in the work of providing credit for agricultural improvements. The government has promised a general law on this subject, which ought to be a veritable charter of liberty for these institutions.

Credit to buy fertilizers and improved machinery can, however, be of little use until the peasantry have the education to understand the need for them. In this respect Spain is singularly backward. Ever since 1857 school attendance of all children between the ages of six and twelve has been "compulsory" by law, but today more than half of the total population remains illiterate. Schools have increased very slowly and are not very efficient. The peasants form the greater part of the illiterate class and in many cases are lazy and unprogressive. They habitually postpone as much work as possible till tomorrow or the indefinite future, and they are strongly prejudiced against any innovation upon the obsolete methods of cultivation and upon the primitive tools used by past generations. Even the mediæval three-field system is still largely used. Since 1906 some of the leading Roman Catholic clergy have been doing something to enlighten them by holding occasional conferences on social questions in different sections of the country. At Valencia in December, 1907, twenty-six addresses were given by eighteen lecturers, only five of whom were ecclesiastics. The subjects have been chosen with regard to the interests of the people in the locality, those treated at Santiago de Galicia in 1909 dealing with methods of cultivation by small land-

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owners, the organization of agricultural laborers, the problem of emigration *etc.* A number of prelates are becoming interested in this as well as other aims of the Catholic Socialists, and in a country where so large a proportion of the people are loyal and obedient to the clergy such a movement can do great good. As yet, however, they have made only a beginning. The danger is that the bitter feeling between the Catholic Socialists and the Marxian Socialists, anarchists and other anti-clericals may lead each side to forget that its true ideal is economic and social betterment of the masses, not the mere victory of a party.

One of the evidences of discontent among the peasantry which has attracted attention recently is their emigration on a larger scale than before. Agriculture is already hampered by lack of adequate labor supply, and emigration is constantly adding to the scarcity. In the two years 1905 and 1906 alone it is estimated that over 250,000 Spaniards sailed away. About half of these were farm laborers. In the past thirty years the country has lost 30 per cent of its peasantry. In March, 1907, the emigration from Malaga of 4000 Spanish contract laborers in one ship bound for Hawaii aroused so much public comment that the government took the emigration problem in hand. On December 21, 1907, the Cortes passed a law to restrict and regulate emigration, to curb the activity of labor contractors and agents of steamship companies and to protect Spaniards from fraud and mistreatment.

To combat emigration however, is to attack, not the disease, but one of its symptoms. The real evil lies deeper and can be reached only by increasing the fertility of the soil, distributing its ownership more equitably and lightening the burden of taxation. Taxation weighs heavy on the land and is very unequally levied, owing to political favoritism, thus discouraging honest labor and innovation in methods of cultivation. Any apparent increase in prosperity will only bring a heavier assessment to the innovator, unless he stands well with the local *cacique* or boss.

It has already been indicated that the social and economic problems of Spain are complicated by political problems; and it should be added that all the reform efforts that have been

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described are obstructed by defects or abuses in the political system. The government cannot be depended on to carry into effect any legislation, however enlightened or admirable. A majority of the labor laws and agrarian laws on the statute books are *fiat* laws, existing only on paper. They are merely unredeemed, and apparently irredeemable, orders on the government. That these laws remain unexecuted is not the fault of the Institute of Social Reforms, which does everything in its power to carry its legislation into effect. On its recommendation in 1906 a corps of factory inspectors was authorized, but at the end of nearly four years only eight had been appointed to cover all Spain. Lack of money constantly hampers the government in its reform projects, but political bossism is the real obstacle. The constitution provides for universal suffrage, but real political power is still held by an oligarchy of nobles. The Spanish nation has never yet been completely amalgamated. Local patriotism is strong in nearly every parish and province, but there is relatively little national patriotism. The people as a whole are indifferent to national politics except when touched directly by the burdens of war or by new taxation. According to Señor Picavea,[1] the Spanish people have two deep-rooted defects of character: the predominance of passion over will and a strong tendency to substitute "the socially inadequate sentiment of friendship and affection" for the principles of justice. The latter, he asserts, is the source of administrative immorality—not so much venality or a disposition to steal as a willingness to favor a friend just because he is a friend, whether honest or not. The Spaniard feels no motive for action on behalf of remote or unseen persons. Be that as it may, *caciquismo*, as bossism is called there, dominates the peninsula and is almost a national institution, so permanent is its machinery and so perfectly does this act on orders from Madrid. Below the important *caciques*, whose influence covers a whole region, are subordinates who enjoy outrageous privileges as long as they remain loyal to their superiors.

[1] Ricardo Macias Picavea, El Problema Nacional (1899), cited by Havelock Ellis, The Soul of Spain (1908), p. 390.

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These petty tyrants often turn the water from the irrigated lands of their enemies to those of their friends or extort money by threats to do so, allow themselves and their partisans to escape taxation, and even take possession of their opponents' property with impunity. They control the administrative officials and judges to such an extent that it is almost impossible for the poor to obtain redress against them. In Andalusia they even ally themselves with the brigands that still infest the country. *Caciquismo* imposes on the agricultural laborers burdens in some respects worse than those of the medieval feudal régime, and its grip on them is likely seriously to hamper the execution of laws for their benefit, even if the peasant's inherited tendency to adhere to traditional methods is overcome. Many landowners, too, fear that any improvement in the condition of the laboring classes will necessarily increase the net cost of labor. Thus powerful interests, in close alliance with the political oligarchy which controls the administrative machinery, are opposed to and thwart social reform. The king can do much to favor the reform movement, but he must act through a political party, and the old parties have been too closely allied with one another as spoilsmen to be active reformers. Hope of political regeneration rests on the rise of a truly national party, directed by the intellectual classes; but in the past these have too often failed to realize their duty. The Spanish people possess many valuable qualities, such as endurance, patience and sobriety; but they need intelligent, unselfish leadership to help them solve their complicated problems. Doubtless some ecclesiastics are obstructionists in the way of thorough social and political reform, but of what value is the separation of church and state to a man whose family is in misery? Want and wretchedness among the mass of the people are the real evils and dangers of Spain; and Liberals of all creeds and opinions should unite to carry out the necessary economic reforms before pushing forward any thoroughgoing anti-clerical program.

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THE DIARY OF GIDEON WELLES[1]

I

IN choosing Gideon Welles of Connecticut to be his secretary of the navy, President Lincoln builded more wisely than he knew. Throughout his administration he found Welles an able administrator and a steady-headed counselor; half a century later the secretary appears as the most illuminating contributor to the inner history of the two administrations with which he was connected and the sturdiest claimant for justice to both the presidents whom he served.

The appointment of a journalist to high office is rarely fortunate; at any rate it rarely excites enthusiasm among the journalists who are not appointed. Mr. Welles, while a newspaper man of long standing and high reputation in Connecticut, had risen to local distinction as a politician also and doubtless was on that ground selected for office by Mr. Lincoln. The journalistic quality was in the blood, however, and the craving for self-expression through the pen satisfied itself in the *Diary* that is now published. The regular practice of making entries did not begin till long after the beginning of the Lincoln administration. The first entry bears the date August 10, 1862. To cover the gap, the actual diary is preceded in these volumes by a reproduction of some matter written by Welles in the early seventies, describing from memory events from March, 1861. The last entry in the *Diary* is of June 6, 1869. By no means does every day have a record. Gaps of several days are frequent, and gaps of weeks are not rare. Some of these intervals were crammed with important events concerning which a day-by-day record would have been most desirable. The summary that Welles often contributes from memory at a later date lacks much as a substitute. For example, there is no entry from August 25 to September 17, 1866—the three weeks during which Johnson's famous "swinging round the circle" took place. Under the latter date a résumé of the tour is given, but it lacks some matters that would be interesting. Light might have been thrown, for example, on the categorical statement of Dr. Rhodes that the president was drunk when he spoke at Cleveland. Dr. Rhodes is too careful and conservative a historian to have made such a state-

[1] Diary of Gideon Welles. With an Introduction by John T. Morse, Jr. Boston and New York, Houghton, Mifflin and Company, 1911.—Three volumes: liii, 549, 653, 671 pp.

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ment without good authority, although he omits to name it. Probably it was the oral testimony of some one among the crowd that heard Johnson's speech. Welles might have contributed the testimony of one who was in immediate touch with Johnson.

The value of these volumes as a source for the history of the times depends chiefly upon two factors: first, the candor and sincerity of the writer, and second, the accuracy and completeness with which his record has been reproduced in print. In both respects the value of the *Diary* is unimpeachable. That it was written, not with a view to publication and ulterior influence, but for the satisfaction and information of the writer, is conclusively established by both internal and external evidence. No man of Gideon Welles's shrewdness and literary skill would have been so repetitious, spiteful and scandalmongering if he had been consciously striving for effect upon others. The attentive reader will find repeated indications that the diarist's mind is utterly void of every interest save that of expressing the feeling that floods his soul as he writes. Absolute discretion as to publishing the *Diary* was left by the secretary to his son, Edgar T. Welles, whose judgment, when the question was raised a few years ago, was strongly adverse to more than partial publication. That this judgment was submitted to the criticism of men interested professionally in history and was given up in consequence of their representations, not only guarantees the accuracy and completeness of the work, but also puts the world of history students under lasting obligation to Mr. Edgar T. Welles. A few omissions have been made; but they are all indicated, and the grounds for making them insure that the general utility of the *Diary* suffers no detriment.

II

While we may assume, then, the candor and sincerity of the diarist, we are by no means bound to accept without question all or most of his opinions. He was, especially in respect to his political associates, a man of intense prejudices. The obviousness of these prejudices is the most convincing proof of his sincerity in the *Diary*. As to William H. Seward, for example, the most superficial reader will early discover that Mephistopheles in all his glory was not equipped like him. No merely human being could ever really be so guileful, sly and shifty as Seward seemed to Welles. The *Diary* is a continuous indictment of the secretary of state's manner and methods, without impeachment, however, of his patriotism or his intellectual endowment. Of the three and a half pages devoted to Seward in the index, it is safe to say that three and a quarter pages are made up of items involving disparagement of that

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gentleman. Edwin M. Stanton ranks second as to bulk, but easily first as to bitterness of Welles's depreciation. This corresponds very well with the known characteristics of the two men; for it has long appeared from other evidence that where Seward was merely meddlesome and irritating Stanton was malevolent and contemptible. Both Seward and Stanton early came into collision with Secretary Welles on matters of administrative jurisdiction, and both, assuming that the patriarchal-looking Yankee could easily be shoved aside, promptly discovered the contrary. The prejudice created in Welles by these early encounters colored his judgments ever after.

Many names no less prominent than those of Seward and Stanton are pilloried by Welles. Chase, Sumner and Grant all make a sorry showing in his description and analysis. Whether his judgments on these men are correct or not, there can be no doubt that the opinions he formed give a distinct color to what he records in his *Diary*, and must be taken into account accordingly. The vast preponderance of unfavorable judgments on the character and actions of men will impress every reader. Lincoln, Johnson, Sherman and Farragut come through his record with creditable standing, but of men of the first rank they are practically all. This fact tells probably more about Welles than about the subjects of his comments. He was honest, clear-headed, conscientious, but intensely self-centered. A criterion by which in large measure he unconsciously gauged the quality of his associates was their appreciation of himself. Lincoln and Johnson, for example, in giving him a cabinet position, necessarily qualified as possessors of sound judgment, though their rank in this class varies perceptibly according to the extent to which their confidence was given to Welles or (as he considered to be quite too often the case) to Seward.

Along with this criterion derived from his personality, another factor in all his estimates of persons was the political. Welles had been a strong Jacksonian Democrat, and had left the Democracy to become a Republican on the slavery issue at the age of fifty-two. He always took his politics seriously, and hence his Republicanism never lost the flavor of old-time Democracy that years of activity in earlier life had made part of his character. The *Diary* gives abundant evidence that the ancient dislike of Whigs and all their works was operating to shape his views on current issues. Thus in August of 1864, apropos of trouble with the politicians over the Brooklyn navy yard, he reflects that the Republicans of Whig antecedents are venal and corrupt, with little political principle and no belief in public virtue or popular intelligence (II, 122). In November he records his conviction that "Fessenden is of

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the old Whig school of folly on finance and the currency" (II, 180). As the issues of Reconstruction developed, his conviction that the sound old views of the Constitution were threatened by Whig fallacies led him to record himself formally as a Democrat. October 21, 1865, in resenting a failure by Seward, in a public speech, to do justice to Welles's services in the cabinet, he ascribes the failure to the Whig Seward's jealousy of the Democrat of the Navy Department (II, 384). Later he finds Seward trying to revive the Whig party (III, 47); and finally, he sees in the counsels of caution that Stanbery and Browning oppose to his aggressiveness suggestions of the ancient antithesis: "They are Whigs; I am a Democrat. They are afraid to trust the people on a question of right; I hold it our safety and strength" (III, 244). His perseverance in the Democratic faith during the later years of Johnson's term becomes pathetic. The Radical majority in Congress went steadily on, playing havoc with every principle of right and law that Welles held dear, and popular sentiment sustained the process at every opportunity. Yet night after night the diarist found comfort in recording his unfaltering confidence that the people were sound at the core and would soon repudiate the unscrupulous politicians who had misled them. Only after the presidential election of 1868 did this confidence seem to give way. The choice of Grant to be president of the United States was too much for the democracy of even so staunch a Democrat as Welles. In a gloomy retrospect of the year on December 31, 1868, appears this despondent admission: "There has been much to impair confidence in the intelligence and integrity of the people to govern themselves" (III, 495). Discouragement breathes from even the grammar of this entry.

While the personal and political idiosyncrasies of Welles are conspicuous in the *Diary* and are to be taken into account in judging it, they detract little or nothing from the value or the interest of the work as history. Over against the peculiarities noted above is to be set very convincing evidence that the secretary of the navy was a capable administrator and a sagacious counselor. That the work of the navy was no less efficient and important than that of the army in the Civil War is a commonplace to serious students of history. That Welles received far less popular recognition than was accorded to Stanton was always galling to the former. With all allowance for this feeling, there is to be found in the *Diary* strong confirmation of what was pretty well known before, that not only in virility of character but also in executive ability the unostentatious head of the navy overtopped the blustering, bullying, timid, fawning, industrious secretary of war. The sometimes tiresome details of departmental difficulties set down in the *Diary* show

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a resolute and generally successful opposition to favoritism, graft, political assessments and other familiar forms of maladministration. To anyone who knows anything of the widely ramified activities and influence of the Blair family in politics, there is much entertainment in the lugubrious narrative of Welles's efforts to follow the ordinary practice of the department in the rank and assignment of an officer who happened to have married a daughter of F. P. Blair, Sr. The officer did not approve of the secretary's disposition of his case, but was peremptorily suppressed by his superior. Then began trouble for Welles. He was beset on all sides by Blairs and rumors of Blairs. The septuagenarian head of the family held up the secretary for hours, rehearsing a whole Iliad of woes that the family had suffered in its long and unselfish devotion to the public service. Montgomery Blair, a rather close friend of Welles, was a brother-in-law of the officer in question, but had not spoken to him for years. In the true spirit of Kentucky, nevertheless, Montgomery joined with his clan in behalf of its adopted member. The president's secretary and the president himself went over the matter with Welles. Mrs. Welles was informed by Blair emissaries of her husband's cruelty and Pharaoh-like hardness of heart. A whole orphan asylum was precipitated upon the harassed chief of the navy (II, 514), demanding that in the interest of the orphans he revoke his orders. After a stout resistance the badgered and disgusted secretary at last gave way, and found the only consolation that was left to him in going home and recording his feelings in his *Diary*.

As a counselor during the panicky crises of the war, Welles is shown by the record to have been generally cool and conservative in judgment and steady of nerve. The contrast in this respect with Stanton was marked and was fully realized by Welles, who took a malicious joy in exploiting it both in act and in record. The frantic terror exhibited and disseminated by Stanton over the "Merrimac," when she was operating at Hampton Roads, amused and disgusted Welles, whose diagnosis of the situation was perfectly confirmed by events. So, too, at the end of the war, when the Sherman-Johnston agreement excited Stanton to ridiculous suspicions and outrageous action, Welles is shown to have formed a very just estimate of the actual facts and the desirable policy in the case (II, 296, 297). On the large questions of military and political policy during the war the secretary of the navy was generally a convinced supporter of the president. Possibly a careful analysis of the *Diary* would disclose that the energy of Welles's support was rather closely proportioned to his confidence that Lincoln had not derived his policy from Seward or Stanton. Certain it is that where the

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president's course does not meet with Welles's approval the *Diary* almost uniformly attributes the procedure in question to one of those advisers. On one point, where Welles's judgment, as against Lincoln's, is confirmed by all competent observers, the *Diary* reveals the writer's utter despair of understanding the president. Why was General Halleck retained in a position of responsibility at Washington for the last three years of the war? Welles very early realized the inefficiency of Halleck and the demoralizing results of his activity or failure to act. The *Diary* bristles with caustic references to the vacuous general's foibles of manner and intelligence. Lincoln never budged, however, from his conviction that Halleck was of some use, and the secretary's criticism evoked only a defense of Halleck as a military expert.

III

With some understanding, now, of the elements of personal and political prejudice that must have influenced the writer, let us consider what contributions the *Diary* makes to our knowledge of the general history of the times.

A summary judgment on this matter may be expressed thus: First, there are no revelations of facts of the highest importance, such as would decisively alter our conception of the men or the events of 1861-69, but there is a vast amount of information supplementing, clarifying and confirming what has been known through other channels. Second, by far the more important part of this ancillary matter relates to the affairs of Johnson's administration and affords for the first time a sympathetic inside view of Johnson in action as president. This latter is the distinctive service of the *Diary*. Circumstances made Lincoln so overshadowing a figure that all the sources of light on his administration, including Welles himself, have been long since exploited; for the flouted and despised Johnson it has been necessary to wait till now to see any great measure of justice done.

Prominent among the lesser revelations of the *Diary* are a multitude of entries showing the operation of the cabinet system and the divisions on questions submitted to the president's advisers. The general impression gained from the work as a whole is that Lincoln was far less regardful than Johnson of the cabinet principle. Repeatedly and mournfully Welles records his grief that Seward or Stanton or Chase has been consulted individually on some important action that is presented to the collected advisers as *fait accompli*. There are less lamentations over such episodes in Johnson's years; but it is not always clear whether this is because Johnson more habitually made policies cabinet questions or because Welles was more often called upon for individual counsel.

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Of the cabinet divisions under Lincoln one of the most interesting was that in April, 1861, on the question whether the ports of the seceded states should be closed by a mere executive order to that effect or by a proclamation of blockade. That the latter method was adopted was a source of permanent exasperation to Welles. He reveals that he made a bitter fight against Seward on the matter—"one of the most unpleasant differences," Lincoln said, "we ever had in the cabinet" (II, 254). Welles's view was supported by Blair and Bates, and would, according to Welles, have prevailed but for the tergiversation of Chase, who in private concurred with the opinion of Welles but failed to sustain him in the cabinet discussion (II, 246, 254).

The views of Johnson's advisers were in large measure made public through the incidents of the struggle with Congress and the proceedings relative to the impeachment. Some rather interesting additions to our knowledge, however, are made by the *Diary*. We learn, for instance, that the extraordinary panic of Stanton over Sherman's agreement with Johnston took a much exaggerated form in the head of Attorney-General Speed, who was clearly the featherweight of the cabinet. In the meeting of April 25, 1865, says Welles: "Speed came fully charged, and had little doubt that Sherman was designing to put himself at the head of the army. Thought he had been seduced by Breckinridge, and was flattering himself that he would be able to control and direct public affairs." To which the steady-headed Democrat from Connecticut replied that he had

> no fears of his [Sherman's] misleading the army or seducing them to promote any personal schemes of ambition if he had such. Every regiment, and probably every company, in that army had intelligent men, fit to be legislators; they were of us and a part of us, would no more tolerate usurpation on the part of Sherman than we would.

But the agitation of Speed did not yield to this dose of plain common sense, and he broached the delirious idea that Grant, who was on his way to North Carolina, would be put under arrest by Sherman, with consequences that the diarist veils by a discreet "*etc. etc.*" Then Welles reflects: "Men will have strange phantoms. I am surprised at Speed, but he has evidently conversed on this subject before with some one or more who has similar opinions." The responsibility for all the excitement is traced to Stanton, "who seems to have a mortal fear of the generals and the armies, although courting and flattering." And Welles concludes, *suo more*, by an unflattering diagnosis of Stanton's motives:

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He went to Savannah to pay court to Sherman when that officer was the favored general and supposed to have eclipsed Grant, but, the latter having gained the ascendant by the fall of Richmond and the capture of Lee, Stanton would now reinstate himself with Grant by prostrating Sherman [II, 297].

The first formal cabinet discussion concerning the trial of Jefferson Davis, July 21, 1865, is reported in full in the *Diary*. There was much diversity of opinion on two questions: what the charge against Davis should be, and whether he should be brought before a military commission or a civil court. The result reached was, by a unanimous vote, that he should be tried for treason. As to the tribunal, a civil court was favored by all but Seward and Harlan, who stood out for the military commission on the ground that conviction could be insured only in that way (II, 337 *et seq.*).

The very stern and serious politics of the summer of 1866 were broken by something like a comic interlude, on the occasion of the Fenian movement along the Canadian frontier. Action to suppress the disturbers became imperative, but every head of department manifested a singular readiness to let his colleagues take the lead in the matter. Welles, called upon by Seward to furnish vessels to guard certain rivers, quickly detected "one of those low, intriguing, petty, contemptible proceedings, shunning responsibility, to which Seward sometimes resorts," and wanted to know why Stanton and Grant did not act with the army, to which the business belonged. And why didn't the revenue cutters of the treasury and the United States marshals under the attorney-general do their duty? And why did not Seward issue a proclamation defining the situation and determining whether the matter was one of war or of riot? It turned out that none of these officials wished to appear conspicuously in the affair, and there was a vast amount of backing and filling before decisive action was taken. The episode throws an entertaining light on the potency at that date of the Irish vote (II, 518).

The origin, progress and culmination of the conflict between President Johnson and the radical Congress receive much illumination from the *Diary*. We learn, as has never been understood before, with what ardor and aggressiveness Welles urged the president on in his policy. No counsel of concession or of moderation ever came from the secretary of the navy. On the contrary, scarcely a day passed, when the fight was at its fiercest, without some urgent appeal to Johnson for more energetic and ruthless action. When opportunity to see the president was lacking, Welles rarely failed to record in his *Diary*, at any rate, his conviction that if the president should be beaten, it would be due to the

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fatal weakness of yielding to the mild and paltering, if not absolutely traitorous, suggestions of Seward.

The Andrew Johnson that appears in the *Diary* is anything but the hot-tempered dictatorial boor that he has commonly been represented to have been. He was indeed a hard man to drive, but it was no great task to lead him. Seward's frequent success in this respect drove Welles frantic; for Johnson's political and constitutional beliefs were avowedly much nearer to those of the Democrat Welles than to those of the Whig Seward, and yet the president was continually tending to wander from the narrow highway of the true faith into the seductive byways of Whiggish opportunism. It has never been hard to understand why Johnson rejected the policies of Stevens and Sumner in 1865; those arrogant leaders must inevitably have alienated him. But why he failed to get on with such men as Trumbull, Grimes and Fessenden, through whom he might have achieved much that he strove for, has never been clear. Temperamental incompatibility had something to do with it; but it would seem that the fault was at least not all with the temperament of the president. The *Diary* records a long conversation with Grimes, from which it seems that he and Fessenden abandoned the president under the influence of rather petty jealousy and spite. They were called in consultation by Johnson at the meeting of Congress, but soon severed relations with him on discovering that he "conversed freely with others, was not likely to commit himself to their keeping exclusively. . . ." Welles valiantly defended his chief in this colloquy, and elicited from Grimes the opinion "that the Southern people were a damned set of traitors, as bad now as at any time during the Rebellion, and he had no confidence in them" (II, 449)—an opinion that probably accounts as much as anything merely personal for the opposition to Johnson. For the president steadfastly insisted that the Constitution insured rights to the Southern states irrespective of the feeling of their inhabitants, while the radical Congress acted on a contrary belief.

At the time of the definitive breach between Congress and Johnson, by the passage of the Civil Rights Bill over the veto in April, 1866, Welles's record is of absorbing interest. Several entries throw a disagreeable light upon the candor and good faith of Senator Morgan of New York, whose vote with the majority gave the victory to the radicals (II, 475, 487). Johnson seemed to feel his defeat deeply, and he was fully aware that some of his cabinet rejoiced at it. A few days after the decisive vote, Welles, upon the urging of Senator Doolittle, talked for an hour with the president about the desirability of getting rid of at least Stanton and Speed, who were known to be inimical to his policy.

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The record of Johnson's remarks is the first authentic account ever published of his ideas about his advisers. He took the ground that men in their position should be presumed to have sufficient delicacy and sense of propriety to resign when they were out of harmony with the policies of their chief. The principle here laid down was certainly creditable to Johnson's courtesy and forbearance; and in the case of Harlan, Speed and Dennison it was justified by the event, for they resigned when their difference with Johnson became well-defined. The unspeakable Stanton, however, the whole depth of whose meanness and treachery Johnson never knew, clung to his office in defiance of every presumption of decency and labored with all malignity to bring upon his chief the utmost humiliation that a public officer can experience. It was unquestionably Stanton's calculated intimations to the radicals of projects of violence on the part of the president that contributed most to the demand for impeachment.

On the origin of the famous Philadelphia Convention of August 14, 1866, the *Diary* throws much new light. A voluminous record is given of the conferences at which the call was formulated; and the difficulty of organizing a party out of such reciprocally repellant material as that represented by Welles and Seward is vividly illustrated (II, 529 *et seq.*). The president's speech-making tour in September, 1866, on which he was accompanied by Welles, is described only after its completion. It is interesting to notice that the diarist is apprehensive that Johnson may have injured his cause by many speeches, and roundly declares that the president should not be a stump-speaker. Seward appears to have shared Johnson's belief that appeals to the people face to face would win favor (II, 594). The disastrous effect of certain parts of the speeches is later conceded; but these particular episodes, so effectively exploited by the radicals, are held to have been the result of concerted plans by his adversaries to interrupt and embarrass him.

After the elections of 1866 showed the country to be with Congress, the administration was put wholly on the defensive, and struggled with desperate energy to maintain the rights of the executive against the aggressions of Congress. In view of the day-to-day revelations in the *Diary*, the once common idea that Johnson was a gloomy despot, seeking to retain power by turning the government over to the rebels, seems supremely ridiculous. In fact he was trying his best to perform his constitutional duty of executing the laws, while hampered and thwarted in a hundred ways by the hostility of the radicals. His cabinet was weakened by the presence of Stanton, whose sympathy with Congress became somewhat less covert after the elections of 1866. Despite the

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incessant urging of Welles and other staunch supporters, the president refused to believe that it was yet time to get rid of Stanton, foreseeing the unlikelihood that the Senate would confirm any less offensive successor and fearing the charge that he was assailing a great patriot. Intimations that Johnson was contemplating a *coup d'état* by means of the army were craftily given out by Stanton, either from timidity or from mental irresponsibility or from sheer malice. Such rumors naturally inspired the radicals to sustain Stanton resolutely in his place. The secretary at the same time maintained at the cabinet board the rôle of one who in general approved of the administration but regretfully differed on a few minor points. For example, in January, 1867, in view of Thaddeus Stevens's bill to put the rebel states back under military government, the president one day polled the cabinet, unexpectedly and without advance notice, on the question whether such territorializing of the states was constitutional; and Stanton joined cordially with all the rest in declaring that it was not, and that what the president had done in restoring the states was right and must stand (III, 10). And again, as was revealed at the time, Stanton joined in preparing the veto of the Tenure-of-Office Act, one clause of which was particularly designed to prevent Johnson from removing him. By such conduct the secretary so far disarmed the president that nothing was done till August. Then at last, when Stanton took a bold stand against all the rest of the cabinet on the interpretation of the Reconstruction Acts and Congress promptly enacted Stanton's version into law, Johnson suspended the secretary and installed Grant in his place.

One of the most intensely interesting revelations of the *Diary* is that concerning the course of General Grant during this exciting time. The competition for the general's support was exceedingly keen between the administration and Congress. Welles records many incidents in this strife, with much entertaining light on the struggles and perplexities of the distracted general. The diarist's judgments as to Grant's mental and moral qualities vary greatly according to circumstances: when the general seemed well disposed toward the administration, he appears well-meaning and rather shrewd, but when he displayed any leaning toward the radicals, Welles records grave suspicions as to his intelligence and integrity. The reader will be apt to gain from the *Diary* as a whole the impression derived from other sources—that Grant was honest and patriotic in general purpose but very inadequately equipped with the knowledge or sagacity essential to practical politics. This certainly appears in a long conversation between Grant and Welles recorded in the Diary (III, 176). It occurred shortly after the general became

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acting secretary of war. Welles was interested in sounding the general, and the result was the enunciation by Grant of many views that showed sympathy with Congress in the existing situation. Among other things he declared explicitly that it would be his duty to regard any act of Congress as valid law until it should be declared otherwise by the Supreme Court. Welles labored strenuously, but with small effect, to convince Grant that this was fallacious. The general's knowledge of the Constitution proved too rudimentary to make the argument serious. He suggested, for example, that the clause authorizing the appointment of inferior officers by heads of departments would apply to the generals in command of military departments or districts (II, 177). Welles's patience was greatly tried by this essay in constitutional law, and he was irritated and alarmed at Grant's steadfast adherence to the idea that any enactment of Congress, even though palpably in conflict with the Constitution, must be obeyed. The president was promptly made acquainted with the details of this conversation, together with Welles's fears "that Grant was weaker and a little farther astray than I had apprehended"; and Montgomery Blair was urged by the agitated secretary "to see Grant, talk with him, get others who are rightminded to talk with him also, and write him—enlighten him."

All the efforts of the administration did not rescue the general from his deplorable condition. The radicals were as active as the president's friends in laboring with Grant, and the result was a course of events that must have been very mortifying to him. He was in the immovable grip of two clear convictions: first, that the Reconstruction Acts, the Tenure-of-Office Act and other legislation must be duly executed, regardless of dispute as to their constitutionality; and second, that as an officer of the army he was bound to obey his military superior, the president, as commander-in-chief. In the Reconstruction Acts and other legislation the radicals, distrusting the president and aiming to embroil him with Grant, had embodied provisions conferring specific powers of far-reaching import on the general of the army. These provisions, Grant was convinced by the radicals, made him, and not the president, responsible for the execution of the Reconstruction Acts. When, therefore, a difference of opinion arose between Johnson and Grant as to the administration of these laws, the general got into much trouble. First he announced categorically to Johnson in the cabinet, that he did not approve certain orders that had come to him from the president—that they interfered with his (Grant's) duty to execute the laws. Here was a direct defiance of Johnson, who rose to the situation. "The President," Welles wrote, "was very cool, calm and deliberate in

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his reply. . . ." After recounting the circumstances of the situation, he said (Welles puts the words in quotation marks) :

> General Grant will understand it is my duty to see the laws are executed, and also that when I assign officers to their duty my orders must be obeyed. I have made this arrangement and performed this work deliberately, and it will go with as little delay as possible.

Before this "great rebuke," as Welles calls it, the general's self-assertiveness subsided and the instinct of the military subordinate assumed sway. Once out of the trying atmosphere of the cabinet room and surrounded by his radical advisers, however, Grant's conviction of his duty revived, and he penned a long letter to the president setting forth again his views of his powers under the law. Johnson, quite conscious that the general's strength was in long-range and epistolary debate, sent for Grant and talked to him. At this interview the general's military training again took control, and he withdrew his letter.

The details of this episode, as given in the *Diary*, are more vivid than in any previous description of it, and, however colored they may be by Welles's prejudices, they reveal a situation that was most perilous. No extraordinary knowledge of history is necessary to suggest what might have happened if the famous and popular general who defied the chief civil magistrate had been endowed with anything of the spirit and ambition of Cæsar, Cromwell or Napoleon.

Grant's difficulties in his effort to follow the lead of his two contradictory convictions culminated in a collision with Johnson that ended all personal relations between them. This episode, very fully exploited in connection with the impeachment, to which it was a prelude, gains something in vividness, though not in substance, from the *Diary*. Once again Grant is put to confusion and shame by the president in the presence of the cabinet and is forced to admit a violation of an important pledge. Once more the general, taking refuge in correspondence, seeks to sustain his dignity—only to be met by the testimony of the president and five of the cabinet that essential statements in Grant's letter are false (III, 259 *et seq.*).

Concerning the origin, progress and outcome of the impeachment hundreds of little incidents are recorded that illuminate that remarkable ebullition of political spleen. Throughout this period Andrew Johnson's attitude rarely failed to meet the most exacting requirements of dignity. It is refreshing to read the vigorous words of Johnson in March, 1867, when Secretary Browning advised some course that would head off the impeachment movement :

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I will do nothing to check the impeachment movement. . . . I am tired of hearing allusions to impeachment. God Almighty knows I will not turn aside from my public duties to attend to these contemptible assaults which are got up to embarrass the administration. Let the House go on and busy themselves with that matter if they wish [III, 62].

Another incident recorded by Welles is less creditable to the president, but not less entertaining. Early in March, 1868, in connection with preparations for the trial of the president, Seward reported to the cabinet the case of the removal of Timothy Pickering from the office of secretary of state by President John Adams—an episode that made a perfect precedent for Johnson's proceeding in the case of Stanton. This matter gave great comfort to the President's friends, who naturally kept it very quiet for use at the proper time. Shortly afterward Attorney-General Stanbery, at the cabinet meeting of March 7, presented his resignation, in order to be unhampered in his action as counsel for Johnson in the trial. As soon as the matter of his retirement had been adjusted, Stanbery, instead of leaving the room, turned to Johnson and said:

You are now, Mr. President, in the hands of your counsel, who will speak and act for you, and I must begin by requesting that no further disclosures be made to newspaper correspondents. There was in the papers, yesterday or this morning, what purported to be a conversation between the president and a correspondent, in which the Pickering correspondence was brought out and made public. This is all wrong, and I have to request that these talks or conversations be stopped. They injure your case and embarrass your counsel.

Secretary Browning then took up the theme and enlarged upon it. "The President," Welles writes, "was taken aback. . . . But no one justified, apologized for, or attempted to excuse him. He saw that there was general disapproval" (II, 311).

This seems to be the only recorded instance where Andrew Johnson was "taken aback," or where a president was disciplined by his cabinet. Lincoln, on putting McClellan in command again after Pope's defeat at the second Bull Run, seems to have incurred severe criticism from his cabinet, though the record of Welles is not specific. "Much was said," the *Diary* records (I, 105); "there was a more disturbed and desponding feeling than I have ever witnessed in council; the President was greatly distressed." But Blair, at least, was with Lincoln in this matter, and thus the opposition was not unanimous.

From the time when, in August, 1867, Johnson set to work in earnest

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to get rid of Stanton, Welles was more often and more intimately consulted than before on the questions of presidential policy, and was able to record a number of instances where Johnson concurred in disparagement of Seward's methods and judgment. The satisfaction felt by Welles in this attitude of the president was tempered by the conviction that the change had come too late—that Seward's influence had kept Stanton in till the administration was ruined. The impeachment seemed to confirm this view. Welles stood stoutly by his chief through all this time of supreme tension, and watched with undiminished zeal for chances to thwart any insidious suggestions of conciliation by the secretary of state. The choice of Evarts, an old Seward man, as counsel on the trial and latter as attorney-general, made the diarist very suspicious and unhappy, though he seems never to have learned that his suspicions were well-founded, and that Evarts did in fact supplement his efficient services in the public trial of the president by private negotiations through which senators who voted for acquittal were assured in advance that Johnson's future conduct would follow satisfactory lines. Any reader of the *Diary* can easily imagine the language in which such proceedings would have been denounced if Welles had known of them.

There is something pathetic and depressing in the record, as in the facts, of Johnson's administration in its last four months. Nobody cared for it. Even the curses directed at it from force of habit by the radicals were perfunctory and unexciting. All eyes were on the president-elect. Grant, in his triumph, retained the bitterness that he had felt over the cabinet's public denunciation of him as a liar and a man of bad faith. He gave notice that he would not attend a public dinner to Evarts in New York if McCulloch, Welles and Randall were to be present. Seward, however, had been received into the president-elect's favor—a fact that gave occasion for much caustic comment by Welles. The *Diary* of these later days reveals the secular antipathy of the two secretaries also in connection with foreign relations. Reverdy Johnson was negotiating in England about the Alabama claims, and Seward's instructions to him were sharply criticized by the other members of the cabinet. President Johnson was dissatisfied with the course of the affair and seems to have leaned heavily on Welles in deciding how far to give way to Seward (III, 471). The president was keen to have the matter settled in his administration. Welles was as usual convinced that Seward would be too concessive, and his anticipation was confirmed when the Johnson-Clarendon treaty was concluded. Its rejection by the Senate, with only one vote in its favor, gave much satisfaction to Welles (III, 579).

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The very last hour of Johnson's ill-fated administration was tense with acrimony. Grant having announced that he would not ride with Johnson in the inaugural procession on March 4, the committee in charge, with much effort, arranged a plan by which the retiring president and cabinet should have separate carriages. Welles spurned all such paltering contrivances and maintained that neither Johnson nor his advisers could with dignity take part in the inauguration. Seward of course took the other view, and debate was earnest in the cabinet circle. The president was undecided and non-committal. Not until the moment when the party must take its place in the waiting carriages and Seward called upon the president to start did Mr. Johnson finally announce that "we would finish up our work here by ourselves." "Well, you have carried your point," said McCulloch to Welles (II, 541).

On March 17, 1868, Welles took final leave of Johnson and his family, who were leaving Washington. A summary judgment of the ex-president is recorded under that date: "He has been faithful to the Constitution, although his administrative capabilities and management may not equal some of his predecessors. Of measures he was a good judge, but not always of men" (III, 556). The particular infirmity of Johnson is concisely stated in an earlier entry:

> The president, who is accused of obstinacy, has often been too yielding, has tried to conciliate, and the greater his effort the more intrusive and the greater the resistance. . . . Some have advised and encouraged this yielding to wrong; I have never been guilty of it [III, 386].

The literal truth of the last clause in this quotation will perhaps remain the most lasting impression of every reader of the *Diary*.

WM. A. DUNNING.

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HOLDSWORTH'S HISTORY OF ENGLISH LAW[1]

A NUMBER of years ago Mr. Holdsworth set for himself a task of great magnitude and difficulty. That task was no less than the writing of a history of English law from the earliest times down to our own day. Judged by the three volumes that have already appeared, Mr. Holdsworth is succeeding—and succeeding admirably—in the accomplishment of his great object. The work is scholarly, enlightening, entertaining. Everyone who reads it will await the forthcoming volumes with keen interest.

It was time that someone should attempt to write a systematic account of the long story of English law development, for no other work of our own generation purports to cover the same vast field as that embraced in Mr. Holdsworth's plan. Hale's *History of the Common Law*, excellent as a fragment, and Reeves's *History of English Law*, valuable and trustworthy (except in Finlason's edition), were written long ago. Pollock and Maitland's great work traces the development only to the time of Edward I. The recently published collection of *Essays in Anglo-American Legal History*, most helpful as a reprint of divers contributions, does not profess to be a fully comprehensive and systematic account. The present interest in English legal history, evidenced by the activity of the Selden Society and in various other ways, really demanded that some capable scholar should collect and consolidate the results of recent researches. It is fortunate that that scholar has appeared in the person of Mr. Holdsworth, for he brings to the working-out of his task not only the lawyer's fine skill and accuracy but also the historian's noble conception of the growth of institutions, principles and ideas. But Mr. Holdsworth is doing much more than presenting the results of other men's toil: he is combining with those results the gleanings of his own diligent and scholarly work with the original sources. If it be remarked that no scholar could adequately write of the fourteenth and fifteenth centuries with nearly all of the Year Books in their present untrustworthy editions, the reply must be that to have waited for the editing of all the Year Books in the accurate fashion of Mr. Pike and the late Professor Maitland would have post-

[1] A History of English Law. By W. S. Holdsworth, M. A., B. C. L., Reader in English Law in the University of Oxford. London, Methuen and Company. Vol. I (1903): xli, 460 pp. Vols. II and III (1909): xxxi, 572, xxxviii, 532 pp.

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poned the writing of any history of those centuries for many long years to come. It seems clear that it was right for Mr. Holdsworth to proceed at once with the help of the best materials now available, and it is certain that future scholars will find his work with reference to those centuries singularly cautious and sound.

The first volume is devoted to a history of the courts from the age of William I down to present times; and although the Anglo-Saxon system of judicature is thus given no separate treatment, there are nevertheless occasional references to it throughout the account of the later development. The author first traces the history of communal courts, private jurisdiction and the *curia regis* in the period from the Conquest to John's reign. Then, after showing us how and why there came about the decline of the local courts and of private jurisdiction, he takes up in detail the growth of the system of common-law jurisdiction exercised by the Court of Common Pleas, the King's Bench, the Exchequer and the itinerant justices, concluding by a consideration of the jury and the justices of the peace. In subsequent chapters follows the history of the organization and jurisdiction of the House of Lords, the Chancery, the Council and courts of special jurisdiction, such as the Court of Admiralty and the ecclesiastical tribunals. Finally the author comes to the great Judicature Acts of 1873 and 1875 and the new county courts; and then, in the appendix, he gives us the text of various writs and other interesting matter. The reviewer knows of no better statement of the origin and growth of the English courts than that contained in this volume. In view of the fact that English law is largely case-law, it seems fitting that the history of the courts should precede the history of the law itself.

The subject-matter of the second and third volumes is divided into two books, the first dealing with the Anglo-Saxon period and the second with the period from the Norman Conquest to the end of the fifteenth century. In each book the writer first discusses the sources and general development and then proceeds to a consideration of the legal rules themselves. Even though this scheme of arrangement necessarily results in a certain amount of overlapping and in repetitions, it nevertheless seems a thoroughly sound method of setting forth the development. Certainly, as worked out in Mr. Holdsworth's masterly way, this method enables the reader to obtain a firmer grasp of the whole development, both in its grand outlines and in its minute details, than he usually obtains from works of history constructed upon other lines. Mr. Holdsworth's method is essentially the same as that followed by Pollock and Maitland, with such admirable results, in their

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History of English Law. In its main features it is very like the methods of arrangement adopted by Brunner and other continental legal historians: first there comes *die allgemeine Rechtsgeschichte* and then *die besondere Rechtsgeschichte*.

It is matter for rejoicing to find that Mr. Holdsworth gives the Anglo-Saxon period a proper and dignified place by itself, devoting to it over a hundred pages. Too often has pre-Conquest law been accorded only scanty and incidental treatment in historical productions. The Anglo-Saxon age is worthy of separate and systematic treatment; and only when it is fully and carefully studied as a distinct epoch will the legal development in later periods be seen in proper light and clear perspective. Much of the Anglo-Saxon law survived the Conquest and contributed to the growth of local, ecclesiastical and common law in Norman and later ages. The debt of the common law to the Anglo-Saxons is recognized by Mr. Holdsworth at the very beginning of his second volume, where he says:

> We hold that we cannot date the beginnings of the common law much earlier than the first half of the twelfth century. But though we do not see the definite beginnings of the common law much before that date, it is nevertheless necessary to go back behind the Norman Conquest for the origin of many of its rules. These rules of the Saxon period were, it is true, administered and shaped by Norman lawyers; and, if we are to understand the shape which they gave to them, we must often look to the Roman and Canon law. But to understand the rules themselves we must go back to the Saxon period. Without some knowledge of that period we cannot understand the law of the twelfth and thirteenth centuries (II, 1, 2).

It will be well for future historians of English law, whose studies will of course be immensely furthered by the completion of Liebermann's work on the Anglo-Saxon laws, to follow Mr. Holdsworth's example.

In one matter our learned author's account of Anglo-Saxon law seems open to criticism. It may be questioned whether he quite recognizes the full significance of contract in this period. He defines contract in its modern sense as "the agreement of wills embodied in mutual promises directed towards some one object," and then maintains that "there is practically no doctrine of contract in Anglo-Saxon law" (II, 72). Certainly the modern notion of the simple contract is not to be found in Anglo-Saxon times. The contracts of early Germanic societies are "real" and "formal." This is fully admitted by Mr. Holdsworth (II, 73); but it is apparently not quite in accordance with historic fact to hold that in the period before the Conquest contract is "but an insignificant appurtenance to the law of property" and that "we have

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but a few scattered hints which must be eked out with the help of continental analogies" (II, 72, 73). Contrary to Mr. Holdsworth's view, shared by other scholars, the reviewer holds that contract—chiefly the formal contract—played an independent and important rôle in Anglo-Saxon life and law, and that abundant evidence of this can be found in the extant sources. Originally the formal promise was used for a few special purposes, such as the buying-off of the feud and the engagement to marry; but it gradually became usual for persons to bind themselves formally, for instance by the delivery of a chattel of trifling value or by oath, for any purpose whatsoever.[1]

An admirable feature, on the other hand, of Mr. Holdsworth's account of the Anglo-Saxon age is his care in marking off minor periods and his consequent recognition of the legal significance of the Danish invasions. All too frequently do historians treat the long centuries before 1066 as one great period, failing to note various distinct stages in Anglo-Saxon development. Professor Vinogradoff in his *English Society of the Eleventh Century* (pages 4–11, 478) carefully draws attention to the Scandinavian element in English law before the Conquest, holding that "there is a distinct stream of Scandinavian principles and practice running through this preconquestual legal lore," though not forgetting to remind us that "the differences between English and Scandinavian arrangements turn out to be differences in degree and period, not in the essence of institutions." The researches of both Holdsworth and Vinogradoff will undoubtedly tend to effect a clearer recognition of the Scandinavian influences.

In the author's second book, devoted to the mediæval common law from the Conquest down to the close of the fifteenth century, we observe the same attention paid to minor periods. In the years from the Norman Conquest to Magna Charta we are taught to look for "the beginnings of the common law." The reign of Henry III is viewed as the period of "the progress of the common law." In Edward I's time there is "the settlement of the sphere of the common law." In the fourteenth and fifteenth centuries we see "the working and development of the common law." The author sets forth lucidly and with emphasis on salient characteristics the environment in which the common law took root, sprang up and flourished. Our notice is directed to the existing body of Anglo-Saxon law, the incoming of Norman law and institutions, the influence of the Roman and Canon law, the growth of royal power, the rise of Parliament, the establishment of common-

[1] For details, *cf.* Hazeltine, "The Formal Contract of Early English Law," *Columbia Law Review*, vol. x, pp. 608–617.

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law courts, the institution of a legal profession, the growth of a mass of sources of the law and of a legal literature. In his account of the rules of law themselves, the land law, crimes and torts, contracts, persons, succession to chattels, procedure and pleading are all treated in a careful, detailed and illuminating manner. In the appendix the reader will find specimens of original writs from the register, early conveyances, wills and one or two other interesting texts.

The first and second parts of the second book supplement each other. The story of the general development is amplified and enriched by the detailed account of definite rules of law. Only by reading both parts can one expect to obtain the breadth of view and the exact knowledge necessary to a proper understanding of the mediæval law in its entirety; and surely the attentive and thoughtful reader will conclude his perusal of the second book with the firm conviction that the study of English mediæval law is the study of much more than the technicalities of rules and of courts. The reader will come to see, indeed, that the history of England's legal past is largely, in Mr. Holdsworth's hands, the history of social progress and of the ideas developed in the course of social progress—ideas that concern the ecclesiastic, the statesman and the philosopher as well as the scholarly lawyer. It is this "gladsome light of jurisprudence" in Mr. Holdsworth's volumes that will especially interest present-day students of law and of history and will ensure for the work a long career of helpfulness and of intellectual pleasure to future generations of enquirers into the middle ages.

It is to be regretted that the author's account of crime and tort contains only two or three scattered references to conspiracy (II, 309, 382, III, 313, 314), for this subject is one of considerable importance. If Mr. Holdsworth thinks, as he apparently does, that the criminal offence of conspiracy was created by legislation of Edward I (see III, 313, 314), his view receives the support of the late Mr. Justice Wright and of certain other authorities. But there is much to be said for the opinion lately expressed by Mr. James Wallace Bryan, in his *Development of the English Law of Conspiracy*, that criminal conspiracy had a prior existence at the common law. To quote the present reviewer's words in commenting elsewhere upon Mr. Bryan's book:

> As regards the period after the Conquest, we quite agree with Mr. Bryan that the cause in the Shropshire eyre of 1221 much resembles a modern boycott, and that the early writers contain references to "conspiracies." If one views this evidence in connexion with the fact that the Edwardian statutes seem to assume the existence of conspiracy at common law and that the later Year Books contain many references to the common-law origin

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of the offence, one may well be of the opinion that Mr. Bryan is right in contending that Edward's ordinance of conspirators, *articuli super chartas* and definition of conspirators did not create a new crime, but merely gave "definite and authoritative expression" to a conception already existent.[1]

It is also to be regretted that the author has but just touched upon a subject of the greatest interest, namely, the early development of equitable procedure and equitable principles in the common-law and local courts prior to the beginning of the chancellor's equity (see, *e. g.*, II, 248, 249, 321, 502–507 and III, 177). That here is a fertile field for original investigation is evidenced by Mr. Holdsworth's comments and by additional knowledge possessed by scholars in regard to this first stage in the development of equity. The king's court—the court of the common law itself—had already developed a procedure very like the equity of redemption and the decree of foreclosure of the later equity courts. The king's court early enforced the specific performance of contracts, and so too did the mediæval local and ecclesiastical courts. The future historian of the English law will dwell long upon this pre-chancery equity.

Of particular interest is the author's treatment of the incorporate person (II, 322–337, III, 362–376). Apparently he takes the view that the "fiction theory" of foreign lawyers was adopted by the English courts. Since the appearance of the volumes under review Sir Frederick Pollock has presented a strong, and to the present reviewer convincing, argument in favor of the opposite view—that no English court ever officially or semi-officially adopted the fiction theory.[2]

Mr. Holdsworth rarely makes use of the sources of Teutonic law on the continent to explain and elucidate legal development in England. His work would perhaps have been strengthened in places by a fuller comparison of English with continental development. But his subject is, after all, English law, and his native sources are in general ample, and often more than ample, for his purposes; and as a history of English law down to the beginning of the sixteenth century the volumes under review are accurate, informing and inspiring. They constitute a highly valuable contribution to legal and historical science.

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[1] *English Historical Review*, vol. xxv (1910), pp. 146, 147.

[2] *Cf.* Pollock's essay in Festschrift für Gierke (1911), pp. 105–123; reprinted in *Law Quarterly Review*, April, 1911, pp. 219–235.

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REVIEWS

The Conflict of Colour: The Threatened Upheaval throughout the World. By B. L. PUTNAM WEALE. New York, Macmillan and Company, 1910.—ix, 341 pp.

As appears by the title, the author of the present work apprehends that the future progress of the world is likely to be upset by vast conflicts growing out of differences in color. In his opinion the conflict of color possesses "ever new potentialities," so that it may be laid down as an axiom that no sooner will one part of the problem be temporarily solved than another part will claim attention. There is, as he says, "one thing which can never be altered, and that is color"; and the "real root" of the racial difficulty throughout the world is that there exists "a widespread racial antipathy founded on color—an animal-like instinct, if you will, but an instinct which must remain in existence until the world becomes Utopia." Admitting these premises to be correct, it may be questioned whether the author is justified in maintaining that "permanent, and not temporary, measures of relief" may be found in what he calls "the real goal—an Asiatic-African balance of power which shall ultimately exist independent of Europe." Apart, however, from any question as to the practical value of such a measure, it may be doubted whether differences of color merit the importance which the author gives to them in relation to the preservation of the world's peace and order. As differences in color have existed during all recorded history, it is not altogether clear why they are to play in the immediate future a part altogether disproportionate to that which they have played in the past. That differences in color do arouse in human beings a certain feeling of antagonism every sensible observer would be willing to admit; but this is a property common to all differences, whether of language, of dress, of politics, of religion or of manners and customs. Speaking generally, and without regard to individual exceptions, each association of human beings bound together by similar views and habits assumes for itself a certain superiority to any other association representing different views and habits. This is true not only as regards smaller groups but as regards nations: the English think themselves superior to the Germans, and *vice versa;* the Germans think themselves superior to the French, and *vice versa;* and of the

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superiority of the Americans to all other peoples there can of course be no doubt. Recently there has been more or less outcry in the United States against the Japanese, and, if we should hastily assume that this is entirely due to a difference in race or in color, we should be obliged to admit that, in times past, differences of other kinds have created similar outcries, equally as strong, against the Germans or the English or other peoples. At the present moment perhaps the most dangerous antagonism in the world and the one that most threatens to disturb the peace is that between England and Germany, and this certainly is not to be explained by any difference in color. Going back several hundred years, to a time when great wars were produced by differences in religion, we find that Francis I of France, in order to fight his white enemies, was willing to take the unprecedented step of making an alliance with the Turks, overlooking differences in race, in color and in religion all combined. To-day, perhaps partly if not largely as the result of various manifestations in the United States, we find Russia and Japan getting together in the Far East, in spite of permanent racial differences and temporary discords. It would be easy to carry on the analysis of present and past conditions almost indefinitely, to show that differences in color are not likely to assume an exclusive prominence in the development of international relations, although they will continue to play in the future, just as they have done in the past, a certain part, which will on occasion be predominant or subordinate according to circumstances and conditions.

J. B. M.

The International Relations of the Chinese Empire. By HOSEA BALLOU MORSE. London, Longmans, Green and Company, 1910. —xxxix, 727 pp., with illustrations, maps and diagrams.

China and the Far East. Edited by GEORGE H. BLAKESLEE. New York, Thomas Y. Crowell and Company, 1910.—xxii, 455 pp.

Mr. Morse, who modestly calls himself a "compiler," has made a substantial and valuable contribution to what has been published concerning China. He was impelled to undertake his task by the conviction that narratives of events in China have been too often influenced by preconceptions that the Chinese were always right and the western nations always wrong, or *vice versa*, or by the desire to exalt some hero. In such narratives much use was naturally made of salient and picturesque events, such as the imprisonment of the foreign

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merchants and the seizure of opium in 1839 and the affair of the lorcha "Arrow" in 1856, to the almost entire neglect of the less exciting incidents of the intervening years. These incidents Mr. Morse has, without passing over the more attractive topics, undertaken to relate, without omitting anything that may be considered as having appreciably affected the course of history. In the absence of serial publications of state papers, such as the governments of the West are accustomed to issue, he was obliged to rely on other sources. He was able to find, however, in the pages of the Chinese Repository, translations of many of the Chinese state documents; and he has enjoyed the important privilege of access to the archives of the British Foreign Office and has been permitted to publish various despatches which had not previously seen the light. His narrative covers the period of conflict from 1834 to 1860, but he devotes full preliminary chapters to an explanation of the system of government in China, including methods of taxation, and to early foreign relations, to the Canton factories and to the question of jurisdiction. He treats in a manner fairly exhaustive the opium question and the part which the Chinese and foreigners took in the traffic. The censure which he pronounces on Mr. Reed, American minister to China, that he "must be included among those who have betrayed great causes," because, contrary to his instructions, he omitted from his treaty the anti-opium provision of the treaty of Wanghia, may be considered somewhat severe, so far at any rate as he places upon him responsibility for Lord Elgin's course in proposing to legalize the trade. Lord Elgin was a capable diplomatist, with views and purposes of his own, and is hardly a proper subject for the plea of evil suggestion. Indeed, among the very passages which are cited to prove the wrong done by Reed, there is Reed's statement, made directly to Lord Elgin, that he omitted the anti-opium clause at the latter's instance. No doubt it may justly be said that a man of stronger moral fibre than Reed would have firmly adhered to the instructions that were given to him against the opium traffic. But it would be a mistake to lay too much emphasis on the precise phrasing of the author's opinion concerning the conduct of a particular American minister. In addition to careful investigation, Mr. Morse exhibits throughout his work a spirit of candor and a desire to reach just conclusions.

The volume edited by Professor Blakeslee is of a distinctly opposite type to that written by Mr. Morse. It embodies the results of a "conference" on China and the Far East, held with the two-fold aim of emphasizing the importance of fuller instruction in the development of the eastern world and of promoting a more general and more ac-

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curate knowledge of far-eastern conditions. There are twenty-two papers by various specialists, one of whom is Mr. Morse, who writes on the history and economics of the foreign trade of China. The addresses, however, are not all confined to the dissemination of information as to present conditions. Mr. Millard, the author of two works on the Far East, writes on the need of a "distinctive American policy in China," and expresses the hope that on a day not far distant an American statesman, presumably one exercising presidential authority, will announce that the United States considers the territorial integrity and political autonomy of China "within the entire limits of the Empire as now constituted" to be so important that the United States would "regard any encroachment or aggression upon either, by any nation whatsoever, as inimical to the interests of this nation." Mr. Millard thinks that such an utterance "probably would startle the diplomatic world" and perhaps cause a temporary international "flurry," but that it would eventually be a makeweight for peace in the Far East, just as the Monroe Doctrine has tended to protect Central and South America against European ambitions. He does not examine the question whether Russia and Japan, for instance, would view the assertion of a claim of predominant influence and exclusive right of expansion by the United States in China with the same complacency with which they view the assertion of the Monroe Doctrine by the same power in the western hemisphere.

J. B. M.

Das internationale Privat- und Zivilprozessrecht auf Grund der Haager Konventionen. By F. MEILI and A. MAMELOK. Zurich, Orell Füssli, 1911.—427 pp.

Few branches of the science of law have been so generally neglected in this country as comparative law and its complement, the conflict of laws, or private international law, as it is known in Europe. And yet, with the constant growth in international intercourse, no branch of law would seem more properly to justify scientific and methodical study than the body of rules by which we judge the creation, validity, operation and termination of legal relations entered into by nationals of different states or by persons situated in different autonomous territories, or having reference to property situated abroad. The necessity for regulating the difficulties occasioned by divergent systems of municipal law led to the calling of conferences as early as 1874; but the meetings at the Hague in 1893, 1894, 1900 and 1904, at which most of

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the states of Europe were represented, were the first to achieve effective results. The rules there agreed upon have to a considerable extent removed many of the more prominent legal relations, such as marriage, divorce and guardianship, from the field of international legal conflict. While the United States took no part in the conferences, it is nevertheless important that their results be known in this country, not only because of their actual operation on Americans abroad, but because of what we can learn for the development of our own rules on the subject.

Private international law no longer rests on *comitas gentium*, as Kent, Story, Phillimore and others viewed it, but has become a matter of positive law, to which the Hague conferences have given the greatest stimulus. Realizing the futility of any attempt to bring about uniformity in the provisions of municipal law of so many widely different states, especially in matters of family law, European governments and jurists have turned their attention to rules and measures by which the conflicts of laws might receive uniform solution and the difficulties arising out of divergences in municipal law might thus be regulated. Much useful preliminary work in this matter of codification had been done by the Institut de Droit International and the International Law Association.

In the work under review, Professor Meili rounds out his previous studies on private international law by a detailed analytic study of the Hague conventions on marriage, divorce, guardianship and civil procedure. The conventions on marriage include rules regarding the rights and duties of spouses in their personal relations and the effect of the marriage on property. The conventions as to guardianship deal not only with guardianship of minors but also with that of adults. The conventions on civil procedure include the following topics: the communication of judicial acts, especially notices, citations and service of process; the issue of letters rogatory; security for costs by alien litigants; litigation by paupers; and imprisonment for debt. Switzerland became a party to these conventions only, to the discussion of which this book is confined. The rules on bankruptcy have been the subject of a separate work by Professor Meili. The rules on succession have not been agreed to by many states.

Professor Meili has already made us familiar with the results of the Hague conferences by his admirable address delivered at St. Louis in 1904, before the Universal Congress of Lawyers and Jurists. As a positivist in private international and comparative law, he takes rank with Kohler as a philosopher and universal jurist. Both represent the highest type of productive scholarship. In the present work Professor Meili has had the coöperation of Dr. Mamelok, his former student and now

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an attorney in Zurich, whose doctor's dissertation in 1900 on the juristic person in private international law was favorably received.

The authors commence with a short presentation of the general principles of private international law, dealing especially with those concepts and norms on which the conventions rest. They then take up the principles common to all the conventions, particularly their application, their territorial jurisdiction, their ratification, duration and termination, questions of interpretation, the execution of the conventions in the signatory states and their authority in municipal courts.

After this introduction, the authors take up the individual conventions, not in the form of a commentary, but in a systematic treatment of each subject as a whole. A uniform method has been adopted in dealing with each convention. The discussion begins with a statement of the sources of the convention in question in the official documents, including the projects, debates, reports, reading *etc.*, after which follows a section on the territorial application of the convention and its effect on persons and property. The authors then take up the existing divergences in municipal law and the legal position of the subject matter apart from the convention. This is followed by a careful analysis of the provisions of the convention and their solution of the conflict of laws. The frequent reference to comparative law and the clear presentation of the changes effected by the conventions are notable features of the work; Swiss law is emphasized throughout. In mechanical structure, clearness in presenting the subject-matter has been the primary aim. It has been successfully achieved. The principal topics and section headings appear in black-faced type, the more important statements of law in italics. Bibliographic notes are confined to the more important literature. The dearth of English literature is noticeable, very little having been contributed to the subject in our language. Bate's little work on the *Doctrine of Renvoi* is not referred to. The survey of the literature on the Hague conferences is probably the most carefully selected that has yet appeared. It is arranged by subject matters and by countries. Since the publication of the work, Buzzati's important treatise on marriage has appeared in a French translation (Paris, 1911). The appendix is made up of the texts of the conventions, both in French and in German. A more complete index than the book contains is hardly needed, because of the careful topical subdivision throughout the text. The style is simple and easily readable. The volume is a distinct contribution to the literatureof the conflicts of law.

EDWIN M. BORCHARD.

WASHINGTON, D. C.

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Proportional Representation. By JOHN H. HUMPHREYS. London, Methuen and Company, 1911.—xxi, 400 pp.

Never have the advocates of proportional representation had a better opportunity to secure a hearing in England than at the present time, when all parties are agreed that radical electoral reform is imperatively demanded, and Mr. Asquith is proposing a universal manhood suffrage bill, which will doubtless be accompanied by a redistribution of seats. Mr. Humphreys, who is secretary of the Proportional Representation Society, is well qualified to present his cause. He has studied Belgian, Swedish, Transvaal and other elections at first hand (page 206); and he has evidently allowed no developments in his field to escape his observation, for he describes the latest movements in Oregon on the part of the People's Power League.

Quite properly he devotes many pages of his volume to a criticism of the single-district system, demonstrating that it results in gross inequalities in representation (page 18), facilitates violent changes in party government (pages 20, 43), affords no real index of political forces and thus encourages politicians to undertake programs which have no genuine support (pages 41, 42), invites candidates to "trim" instead of honestly and clearly declaring their policies (pages 44, 45), and, finally, is in no small measure responsible for the increasing degradation of party strife by making the battle turn upon a few votes and thus giving the "marginal voters" a weight all out of reason. Of course these arguments and the examples cited in support of them are by no means new, nor do they constitute the more valuable part of the volume.

After stating the case against the single-member district, our author examines the several schemes of proportional representation now in force in various countries or seriously proposed; and, considering them from the point of view of simplicity and applicability to English conditions, he arranges them in the following order: (1) The single-transferable-vote system, in which the surplus votes are taken from the top of the successful candidate's heap. (2) The Belgian list system, with its single vote. (3) The single-transferable-vote system, in which the surplus votes are distributed proportionately to the next preferences. (4) List systems in which more than one vote is recorded (page 206). On the whole, Mr. Humphreys leans toward the single-transferable-vote system, although he believes that the list systems are immeasurably superior to ordinary electoral methods (page 207). He states the grounds for his position very briefly: The single-transferable-vote system is more elastic than the list system, is more easily adapted to new

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political conditions, appeals with greater force to English-speaking peoples and promises more general uniformity throughout the British Empire than any other scheme.

In concrete form his proposition for England is as follows: Abandon the system of single-district constituencies with their ever-changing boundaries and treat the natural divisions of the country (its counties, large towns *etc.*) as permanent constituencies, with representation varying with the growth or decrease of their populations. Then adopt the single transferable vote in elections (page 267).

Mr. Humphreys has increased the value of his work by a series of appendices on the single vote in Japan, the Swedish and Finnish systems, the second ballot, statistical tables of the general elections in Great Britain from 1885 to 1910, and preferential voting. It is clearly a volume which every student of modern politics should have within reach.

C. A. B.

The Business of Congress. By SAMUEL W. MCCALL. New York, The Columbia University Press, 1911.—215 pp.

It is unfortunately true that many of the books on American government are written by men who have little first-hand acquaintance with the processes of governing. This is so because our public life fails to attract scholars like the Morleys, Balfours and Birrells who assume leadership in the English Parliament. Mr. McCall, however, does represent that rare combination of politics and letters; and his book will make a double appeal to the student as being written in a scholarly way and as proceeding from an authoritative source. The subject is a limited one: how Congress works; but within that field there is no book of equal value for the general reader.

Mr. McCall discusses the functions of Congress, the organization and procedure of both houses, the committees, the rules, the order of business, filibustering *etc.* The views he expresses, after eighteen years of service in the House, deserve very serious attention. He has no sympathy with the assault upon the speaker's power, which, within less than two years, has divested that officer of some most important functions. The so-called autocracy of Mr. Cannon (and of his predecessors) depended always on his executing the will of the majority and, wielded by him or some other member of the House, was necessary to the proper transaction of business in an assembly which has no ministers to guide it. The power of the speaker has evolved naturally and steadily; no interruption of its exercise can be permanent.

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As has been urged by some of our leading publicists and by committees of the House (1864) and Senate (1881), Mr. McCall believes that the cabinet officers should be admitted to Congress.

> [They] should be the real executive officers of the country, and not the mere agents of the President. . . . It would be better if the Cabinet were to exercise more real executive power, with the President having powers corresponding to those of the President of the French republic. This is the direction in which the American Constitution would practically grow and develop from the very nature of the case; either that, or in the direction of autocracy.

There would be disadvantages, especially because the president would not be able to dissolve a hostile Congress; but the advantages would more than compensate. There would be a fuller exchange of confidence between the executive and legislative departments. There would be an improvement in the personnel of the cabinet.

> The members of our Cabinet under the present system, with their much narrower range of power, are quite often taken from among men who have had no experience whatever in the conduct of public affairs, or who have never displayed any aptitude for them. . . . If the Cabinet became a part of the parliamentary body, such appointments as have sometimes been made would be impossible, and we should be more likely to have a Cabinet composed of men who had had parliamentary experience and a connection with national affairs, and who also had a talent for business administration. . . . The time would end when it would be possible to have a second-rate lawyer put at the head of the Department of Justice.

It should be noted, however, that the author does not believe that the English system of cabinet government would work well here. It works well in England, he thinks, because of the small area and homogeneous population. "In a vast country like ours there is often a distinct opinion, which grows up in one locality and does not extend to other localities. . . . It is well at such times that the machine should not be too easily worked." This statement is noteworthy for several reasons. It flatly contradicts the belief quoted above that our cabinet should have the position of the French cabinet; and it overlooks the fact, once pointed out by President Lowell, that a cabinet seated in Congress would become responsible to Congress. In other words Mr. McCall believes in the separation of powers, and does not believe in it. He likes the theory, and recognizes the waste and awkwardness of the practice.

The tendency to exalt the executive at the expense of the legislature is reprobated. On this point the author says:

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Even if the influence of local interests may prevent the individual member from speaking for the whole country, after the clashing of localities and sections and the balancing of interests, the House as a whole speaks, and, more nearly than any other organ of the government, it utters the collective voice of the Nation. In these times no one man is great enough to do that.

Another result of the concentration of power in the executive would be to intensify the evils of our presidential election. Even now parties are tempted to regard availability as the supreme consideration. "The man who can be most successfully advertised is the one likely to be nominated." With two exceptions every successful candidate since the Civil War has been a military hero. One of the reasons why presidents are not chosen from Congress is that something spectacular is required for the purpose of appealing to the enormous electorate.

Although a great part of the book is merely descriptive, there is always evidence of a philosophic spirit and an ability to see things in the large. How long must we wait for a work of this kind on our state legislatures?

E. M. SAIT.

COLUMBIA UNIVERSITY.

The King's Serjeants and Officers of State with their Coronation Services. By J. HORACE ROUND. London, 1911.—xiii, 416 pp.

The present century has already seen two coronations in England; and the ceremonies connected with these services, reproducing as they do with "Chinese conservatism" the ritual and pageantry of the middle ages, have naturally given rise to a multitude of claims on the part of lords who cherish a supposed right to render some distinguishing service on these occasions. The claim is usually based either on the fact of an inherited office or on the possession of some estate or group of estates to which the service seems anciently to have been attached. The arguments of the noble petitioners and the awards of the Court of Claims appear to have furnished the irritant that stirred Mr. Round to action and led him to investigate the whole question of serjeanty and personal service to the king both at coronation times and on other solemn occasions. His results have just been published and form an important contribution to the history of the royal household and of court officialdom in the middle ages.

The Court of Claims is, he tells us, "the slave of precedent"; it never inquires into historic rights, but merely seeks to determine whether "a service has been 'allowed' before." But if the next

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tribunal should care to go back of precedents, it will find Mr. Round's work a mine of the most explicit information. With characteristic thoroughness he traces the history of the various serjeanties from their beginnings in the eleventh or twelfth century to their most recent revival, which in most cases was at the coronation of 1911. It is not likely, however, that all the noble families that now claim serjeant rights will invoke the present work at the next Court of Claims. The author has found that many of these families have no historic rights to the offices that they enjoy, and he states his conclusions in language that cannot be misunderstood.

More than half of the volume is devoted to a long chapter on "The King's Household," in which the individual serjeanties are discussed, as well as some offices that in Mr. Round's opinion should not be classed as such. There are also chapters on the coronation services and "the king's sport." Students of English constitutional history will find the first three chapters particularly useful; in these we have a discussion of the general subject, of its relation to knight service, and of mistaken theories as to serjeanty. It seems to be Mr. Round's opinion that the institution was of Norman origin and came into England with the Conquest. It is clear, he tells us, that many serjeanties were in existence when the Domesday Survey was made. "Great escheats to the crown under the Norman kings provided abundance of land from which fresh serjeanties were created; but the process seems to have slackened under their successors and probably died out about the end of the twelfth century, or, at latest, in the reign of John." Mr. Round also derives the great household offices from Normandy through Edward the Confessor. This is scarcely correct; the Anglo-Saxon kings had a relatively highly organized household, fundamentally Germanic, but with peculiarities of its own; but the author is probably right in ascribing increased importance to the various offices under the Norman kings.

"The principle of serjeanty was, no doubt, the grant of land in return for service, when the lack of ready money made the payment of wages in cash a matter of comparative difficulty" (page 14). This service existed in many forms: the serjeant who enjoyed land in return for holding his master's head when crossing the channel is fairly well known; Mr. Round has also found estates held as reward for scalding the king's swine or occasionally turning the spit in the royal kitchen; he has also found a serjeanty of the "hose," in some way associated with the royal wine supply, but in this case he fails to give a satisfactory interpretation of the term or of the service. It is not to be inferred, however, that the chief interest of the work lies in the discussion of the

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unusual services; Mr. Round finds much to say about the offices that are generally thought to be thoroughly understood, such as those of the chamberlain, the marshal, the butler and the baker.

The greater offices of the court were not serjeanties; they were "offices in gross, inheritable as of fee," not connected with certain lands. Mr. Round shows that the barony of the DeVeres was not granted with the great chamberlainship, which they received from Henry I, but dated from the Conquest and was held by knight service. He also shows that the manors supposedly given to the ancestor of the duke of Buckingham along with the constableship were in part acquired at a later date. Similar conclusions are reached with respect to the offices of steward and of marshal.

It is often alleged that lands held by tenure of serjeanty were inalienable and impartible. On the point of alienability Mr. Round accepts the position taken by Pollock and Maitland in their *History of English Law* (volume i, pages 270, 315, 316). On the question of impartibility he goes more into detail, and he shows that in several instances the lands actually were divided among different heirs, although the question as to who should perform the service is not so thoroughly disposed of (pages 43, 135). He also shows that, if the service fell into the hands of a person distasteful to the king, it might properly be refused. The Leigh family held lands, in return for which the holder was to prepare a certain mess for the coronation day; but Charles II, "we are told, carefully abstained from eating it" (page 249).

Mr. Round also insists on a clear distinction between serjeanty and knight service. There was no confusion of these tenures; the one excluded the other; although it was possible to change from one form to the other. As serjeanty existed in so many forms, generalization becomes difficult; but the author thinks he has found an infallible test: scutage, the burden of knight-service, was never charged upon lands held by the tenure of serjeanty. He also holds that the distinction between grand and petty serjeanty had no existence in the earlier centuries of the office and of the tenure.

Mr. Round has found it necessary to correct the views and statements of nearly all the earlier writers who have discussed his theme. He does this in his customary thorough and merciless fashion; sometimes respectfully and sometimes not. For the opinions of Professor Maitland and the learned antiquarian Madox he shows evident regard; but Professor Oman and Mr. Hubert Hall are not in that class.

LAURENCE M. LARSON.

UNIVERSITY OF ILLINOIS.

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The Life of Spencer Compton, Eighth Duke of Devonshire. By BERNARD HOLLAND. New York, Longmans, Green and Company, 1911.—Two volumes: ix, 494, vii, 440 pp.

There are at least three obvious reasons why Mr. Bernard Holland's life of the duke of Devonshire—better known by his earlier title of marquis of Hartington—is of peculiar value to students of English political history from the mid-Victorian period to the end of the reign of Edward VII. More than any other political memoir published within the last twenty years—those of Gladstone and Granville not excepted—the life of the duke of Devonshire throws light on the increasingly difficult and strained relations between the Whigs and the Liberals and Radicals from the end of Russell's leadership in 1866 to the break-up of the Liberal party over Irish home rule in 1886. It contains much correspondence not hitherto published regarding events that preceded the split in 1886; and there is much new material—some of it quite piquant reading—regarding the division in the Unionist party after Chamberlain, in May, 1903, had begun his movement for the revival of the system of protection that was abandoned in 1846. This material, all of it of much service to students of the history of political parties in England, constitutes the chief permanent value of the book. Incidentally, there is much new material illustrating the usages and working of the cabinet system. An additional interest attaches to this biography because it seems highly improbable that any member of the territorial governing class will in future hold the position and exercise the influence in English politics that were enjoyed (or otherwise) by the eighth duke of Devonshire.

Devonshire, when in October, 1903, he resigned from the Balfour cabinet, because he could not associate himself with the movement for protection, had been in Parliament for forty-six years; and for half of this period he had held office in Liberal or Unionist administrations. He began his official parliamentary career under Palmerston. He served in two of Gladstone's cabinets, and was also of the administrations of Salisbury and Balfour. Politics was his only intellectual interest; and yet he had no great liking for political life. Pitt, in 1795, when he was unsuccessfully attempting to carry an amendment to the poor law, confessed that he had no knowledge of conditions out of London. Of Palmerston it used to be said that he had only a carriage acquaintance with people not of his class. Devonshire's knowledge of English conditions was not much more extensive than Palmerston's; and no political movements except those for Irish home rule and for

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the revival of protection, both of which he strongly opposed, ever aroused in him a real interest. There was certainly no movement that he ever exerted himself to forward; and Mr. Holland's biography leaves the impression that Devonshire's long and constant devotion to Parliament and to official political life sprang from a sense of duty. By birth and tradition the most prominent member of the aristocratic governing class in his day, he was in duty bound to take an active part in politics and in government.

Devonshire was the last of the Whig magnates to hold high official position in English political life. Nearly all his colleagues of the Whig order, the men who were with him in Whig and Liberal administrations from 1863 to 1886, were dead or had become Conservatives before he resigned from the Balfour cabinet in 1903. He too had practically become a Conservative. Except that, like most of the Whigs of the nineteenth century as of the eighteenth, Devonshire had no great zeal for the Established Church, it was always difficult to see wherein Devonshire's Whiggism differed from Toryism, and towards the end of his active career his Whiggism had worn so thin that it was not distinguishable from the reactionary Toryism of the Balfour régime that began in 1902, when Salisbury retired, and lasted until the Campbell-Bannerman administration came into power in November, 1905.

From 1867 to 1886 Devonshire's mission was to hold the Whigs, the Liberals and the Radicals together. This was a great service to Whiggism, because at this time the Whigs held three-fourths of the cabinet and ministerial offices, while it is doubtful if they controlled one-fifth of the votes in the constituencies which put Liberal governments into power. In all the Liberal governments of which he was a member, Devonshire was a brake on Liberalism. He usually looked at political questions from the stand-point of what Grey first described as his "order." He was doubtful about the measures to which Gladstone committed the Liberal party, and with Radicalism of the Chamberlain school, from 1870 to 1885, he had little more sympathy than Conservatives like Salisbury or Cranbrook. The position that he held within the Liberal party was not one that he could long have retained after the wide extension of the parliamentary franchise in 1885. He must soon have left the party or have been elbowed out. The correspondence from 1880 to 1886 makes it clear that, if there had been no split in the Liberal party on Irish home rule, the Whigs must soon have found an issue on which they could go over to the Conservatives.

In both parties—in the Liberal party from 1866 to 1886 and in the Unionist party from 1886 to the end of his parliamentary career—

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Devonshire held a remarkable position, largely due to his rank in the territorial governing class, but due also, in no small measure, to his independence, his freedom from anything that savored of self-seeking, and the firmness and sincerity of his political convictions. In the annals of British statesmanship in the nineteenth century, his long career, while not one of marked achievement either in legislation or in administration, is second in its unique interest only to that of Beaconsfield. It can be traced with most advantage in the voluminous correspondence which gives this memoir its chief permanent value. The connecting narrative is ample; in some places it is more than ample, because of the persistence with which Mr. Holland obtrudes his own opinions of men who were Devonshire's contemporaries.

EDWARD PORRITT.

HARTFORD, CONNECTICUT.

David Ricardo: A Centenary Estimate. By JACOB H. HOLLANDER. Baltimore, The Johns Hopkins Press, 1910.—137 pp.

As is stated in the preface, the work under review consists of three lectures, delivered at Harvard University in the spring of 1910 to mark the centenary of the appearance of the *High Price of Bullion,* Ricardo's first important economic publication. The book is divided into three parts, under the captions: "Life," "Work" and "Influence." The account of Ricardo's life shows much painstaking research. Although admirably compact, it is filled with details of a personal character, which will interest a devout admirer of the hero of the story but are of little value to students of economic science. The account of Ricardo's work is of more importance, and here the author is at his best. He has succeeded in condensing into fifty-seven pages a wealth of information about Ricardo's published writings, his correspondence, the correspondence among his contemporaries regarding him and his work, and, in general, his place in the remarkable group of English economists of his day. This has been, for a number of years, a favorite field of study for the author, and he has put into this essay the best results of much investigation. One cannot help suspecting, however, that his admiration for the great man whom he is studying has developed into something like hero worship, and that his emphasis is sometimes weighted with sympathy. When he comes to the discussion of the influence of Ricardo, this suspicion deepens into conviction, and one feels certain that the author is exercising his brilliant faculties to make out a case for his hero. This part of the work reads like a panegyric.

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The historical skeptic is in the field, and during our generation he has broken a good many idols. What will become of the Ricardo myth, or the tradition of Ricardo's influence, when the skeptic who will accept nothing without tangible evidence begins to apply to the commonly accepted story the test of historical criticism, it would be hazardous to prophesy. Beyond a number of general assertions as to Ricardo's greatness, what tangible evidence have we that constructive statesmen were ever greatly influenced by his theories or that succeeding generations of students have turned to him for actual guidance? Such evidence is abundant in favor of Adam Smith, and it is not necessary, in order to establish his greatness, that panegyrics should be uttered or written in his behalf. As to the influence of Malthus, we have the unimpeachable testimony of Darwin, and the fact that the younger Mill suffered arrest for a propaganda that he and his school regarded as the logical application of the *Principle of Population*. It is not necessary, moreover, in order to support the thesis of the greatness of Malthus, that a group of people should tacitly agree among themselves that on every possible occasion they would assert loudly and positively that he was a great economist. The fact that so many praise Ricardo and so few read him, while still fewer quote him, seems to justify a mild skepticism.

The ordinary student of economics, who cannot take the time to delve, as Professor Hollander has done, into the writings and correspondence of Ricardo and his contemporaries, is not likely to get an all-round, or even a two-sided, view of this economist, until some one with Professor Hollander's erudition and brilliancy of utterance, if such a person exists, assumes the role of devil's advocate and presents the evidence against, or at least challenges, every such unsupported assertion as the following:

> In short, Ricardo conceived a positive science of political economy, constituted of the tendencies or laws prevailing with respect to a clearly defined group of phenomena. . . . By this service he raised economic study to a new dignity, giving it consciousness and impetus. . . . His inestimable service was in definitely converting economic speculation from detached inquiry or specific theorization to an organically related body of general principles. . . . What Ricardo did remains the corner-stone of economic science. But more than this, what he tried to do gave the momentum to scientific study of economic principles and has continued its chief inspiration.

T. N. CARVER.

HARVARD UNIVERSITY.

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The Mediæval Mind: A History of Thought and Emotion in the Middle Ages. By HENRY OSBORN TAYLOR. New York and London, Macmillan Company, 1911.—Two volumes: 613, 589 pp.

The author of *Ancient Ideals* and *The Classical Heritage of the Middle Ages* has traveled further down the course of intellectual and spiritual development in western Europe and has given us now a work upon the mediæval mind, proposing, it is reported, to add in time a volume on the characteristic features of the Renaissance. *The Mediæval Mind* strikes the reviewer, first of all, as a marked improvement upon both of its predecessors. It is a more serious and important treatise than *Ancient Ideals* and is clearer in style and arrangement than *The Classical Heritage*. From a logical standpoint its structure as a whole might still be criticised, but section by section the sequence of the argument is ordinarily plain enough. The reader has still, now and then, a sense of unevenness in treatment. In one portion Mr. Taylor dwells upon explanatory biographical or political details, and in another he confines himself more strictly to the matter in hand. Nevertheless one is conscious throughout that one is pursuing a road leading to a definite and well discerned goal. Indeed, in view of the breadth of the theme and the diversity of its aspects, the book is almost surprisingly precise and direct, seldom straying far afield into tempting irrelevancies or involving itself deeply in hazardous speculations.

From the outset Mr. Taylor makes admirably distinct his conception of the duration and function of his period. In his preliminary chapter on "The Genesis of the Mediæval Genius" he presents the three elements which, according to his theory, formed "the spiritual constituency of the middle ages of western Europe": the legacies of pagan thought and of Christian patristic theology and the varying intellectual qualities of the mediæval peoples themselves, Italians, Spaniards, French, Germans and English. "Accordingly," he says, "the proper beginning of the middle ages, so far as one may speak of a beginning, should lie in the time of the conjunction of these elements in a joint activity," that is, the Carolingian epoch. The supreme achievement of the middle ages was "the vital appropriation and emotional humanizing of patristic Christianity," accomplished by slow degrees during successive centuries. In the eighth century the peoples of western Europe were either intellectually decadent or just emerging from a state of semi-barbarism. They had first to con over and learn, little by little, what the ancient world had passed down to them, then to understand and appropriate it more intimately, and finally to make it dynamically their own, reëx-

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pressing and transfiguring it with their own thought and emotion. The task occupied them until the beginning of the fourteenth century, when the transition to a different age, with a different task to perform, may be said to have begun. One could hardly have a more succinct or graphic account of the mediæval position.

The eight following chapters are devoted to an analytical consideration of the antecedents of the middle ages. They show what pagan and patristic thought survived the dissolution of the Roman Empire, the mode of its transmission to the later era and the condition of the more or less Latinized people who received it. The two political chapters on "The Latinizing of the West" and "The Barbarian Disruption" are perhaps unnecessary and are certainly out of keeping with the main tenor of the book. The next six, however, furnish an excellent background for the remainder of the work. They summarize the tendencies of Greek and Latin philosophy and theology, indicate the nature of the intermediate writings of the fifth, sixth and seventh centuries, and characterize the Italians, the Roman provincials and the two new races, Celts and Teutons.

With the tenth chapter begins the second book and the exposition of the subject proper. This book relates the development of mediæval thought and emotion through the Carolingian epoch and onward to the end of the eleventh century. "One might liken the Carolingian period to a vessel at her dock, taking on her cargo, casks of antique culture and huge crates of patristic theology. Then western Europe in the eleventh century would be the same vessel getting under way, well started on the mediæval ocean." Thereafter the divisions become topical rather than chronological. Books III and IV are occupied with the ideal and the actual in religious and in secular society during the rest of the middle ages. The first presents types of great saints, reformers and visionaries and the standards which they struggled to maintain, then pictures of the average life in church and cloister, where ordinary mortals found the standards pitched too high. The second describes, in more sketchy fashion, the feudal and chivalric ideals of knighthood and courteous love, retelling the famous tales of Tristan and Parzival, and then offers suggestions, drawn from the stories of the German minnesingers and the tragedy of Heloise, as to what knighthood and love might really mean. Book VI takes up miscellaneous themes: mediæval use of the classics; mediæval instruction in grammar; the evolution of mediæval style in Latin prose and verse, sequence hymn and student song; mediæval study of the Roman law and its effect upon the rise of canon law and of political theory. The last book, comprising about one-quarter

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of the whole work, reviews the "ultimate intellectual interests of the twelfth and thirteenth centuries," scholasticism, its method, scope and achievements, and closes with a chapter entitled "The Mediæval Synthesis: Dante." With the exception of the introductory chapters this is the part of the book that is most carefully worked out.

On the whole, Mr. Taylor's survey of mediæval thought on literature and life is exceptionally comprehensive. Not many historians possess the breadth of knowledge and interest to handle so many aspects of the mind of any period, and few indeed in this country have the acquaintance with the classics to qualify them to appreciate so many of the mediæval points of view. Mr. Taylor is one of the rare American scholars who writes preëminently as a man of letters and of catholic sympathies and not as a specialist whose range of activity is limited to his specialty. He can give us a book of solid historical worth which has at the same time a genuine literary flavor and the illuminating quality that comes from the frequent comparison of one man or age with other men or ages. It is certainly an ideal preparation for a work on the middle ages to have written previously upon similar phases of the preceding ages and to have gathered impressions and opinions from years of reading in the whole long line of European sources. He ends by writing a work not only comprehensive in its scope, but also human in its many-sidedness of feeling and in its connections with the human story before and since.

Not that it is fair to ascribe all the credit of the book's humanity to Mr. Taylor's exceptional preparation. Imaginative sympathy characterized the *Ancient Ideals* and has marked the author's writing ever since. In the preface he pleads with the reader to assume a fraternal attitude toward the middle ages. After an allusion to the beauty of the mediæval cathedral he says:

> But if the pageant of those centuries charm our eyes with forms that seem so full of meaning, why should we stand indifferent to the harnessed processes of mediæval thinking and the passion surging through the thought? Thought marshalled the great mediæval procession which moved to measures of pulsating and glorifying emotion. Shall we not press on, through knowledge, and search out its efficient causes, so that we too may feel the reality of the mediæval argumentation with the possible validity of mediæval conclusions, and tread these channels of mediæval passion which were cleared and deepened by the thought? This would be to reach human comradeship with mediæval motives, no longer found too remote for our sympathy or too fantastic or shallow for our understanding.

A few pages later he sums up his own idea of the mediæval spirit:

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a spirit which stood in awe before its monitors divine and human and deemed that knowledge was to be drawn from the storehouse of the past; which seemed to rely on everything except its sin-crushed self and trusted everything except its senses; which in the actual looked for the ideal, in the concrete saw the symbol, in the earthly church beheld the heavenly and in fleshly joys discerned the devil's lures; which lived in the unreconciled opposition between the lust and vainglory of earth and the attainment of salvation; which felt life's terror and its pitifulness and its eternal hope; around which waved concrete infinitudes, and over which flamed the terror of darkness and the Judgment Day.

Occasionally even Mr. Taylor seems to run a trifle short in sympathy, to grow a little impatient with the limitations of a particularly benighted set of men, as, for example, the Carolingian scholars, to whom he gives scarcely honor enough for their real though rudimentary attainments. But in the main he can feel with every man; can set forth his disposition, foibles and aspirations almost affectionately, often with kindly humor; can put life into the portraits of such pale abstractions as Plotinus, Porphyry and Iamblichus. Other studies in personality that linger in the reader's memory are those of Peter Damiani, the fiery, keen-witted reformer, horror-stricken at the contemplation of the evils around him and in his own breast; of Anselm, the saintly, gentle idealist and builder of theology; of Romuald, the domineering, savage hermit, consumed with an egotistic passion for making hermits of other men; of Hildegard of Bingen, the sober-minded moralist and seer of visions; of Hildebert of Lavardin, the temperate, scholarly prelate, who drew his inspiration partly from Holy Writ and partly from the classics; of Roger Bacon, the intractable, inductive genius, out of tune with almost all the movements of his day. Mr. Taylor has a happy knack of imparting individuality to his men and women, and these vivacious character sketches are merely some of the best in the large collection.

One cannot let pass without a word of commendation the careful and abundant use of extracts from the sources. No person of importance is denied the chance to represent himself to some extent, at least, in his own words. Practically all the material thus given is new in English, and some of it is difficult of access even in the original. The teacher of mediæval history might conceivably use the book as a supplement to the scanty number of existing collections of mediæval sources. Of particular interest are Othloh's accounts of his monkish temptations, Salimbene's stories of Italian and French life in town and monastery, the allegorical sermons of Honorius of Autun, the illustrations of mediæval prose and verse and, last of all, the passages from the

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scholastic philosophers, especially Bonaventura and Thomas Aquinas. In fact, the reviewer recalls no place to which one may better direct a student who needs, not a résumé of the points of scholastic doctrine, but an actual, discriminating conception of the character of scholastic thinking, the method of reasoning it followed and the quality of results it produced, than to the last half of Mr. Taylor's second volume. The only original material recently published of whose existence Mr. Taylor does not seem aware is the collection of fragments from Roger Bacon's lost works, edited by Mr. Richard Steele. The Metaphysics is a curious piece in Bacon's bizarre style, but valuable as indicating his knowledge of the Arabian philosophers.

Mr. Taylor has gathered so much into his book that it seems ungracious to allude to any topics which he has omitted or treated inadequately. Yet one wishes that he had included a few pages on the origins of religious dramatic poetry, and had said a little more than he has said on the plastic art that was contemporary with the literature and formed another record of mediæval thought and feeling. The most faulty passage in his whole work is perhaps that in which he cites the testimony of basilica mosaics and frescoes to prove the slow awakening of emotion in the handling of religious themes. The art of the eighth, ninth and tenth centuries was undoubtedly "decadent and barbarized," but the process of emotionalizing and humanizing it had already begun, albeit in crude and simple hands. There were awe and fear in the artist who drew the solemn, emaciated Christ in the apse of Santa Cecilia; love and aspiration in him who made the little saints stepping blithely over flowery fields on the arch of Santa Prassede; sympathetic imagination in those who painted the excited disciples watching the ascent of the Virgin and the beautiful scenes from the life of St. Clement in the lower church of San Clemente. The mosaics in the nave of Santa Maria Maggiore are usually assigned to the fourth rather than to the fifth century. Dr. Richter even argues that they belong to the second, so different are they in their vigorous realism from the stiffer work of the later centuries. Before Giotto's day Duccio of Siena, the artist who is known as Cimabue, and others like him painted gentle Virgins and human Christs. Giotto himself verily fashioned a "dramatic art," but he learned how to tell a story with his brush from the Roman Cavallini, who was not his pupil but his master, and who dated his mosaics in the church of Santa Maria in Trastevere in 1291, not 1351. Mr. Taylor's thesis that emotion in the art of the middle ages developed side by side with emotion in the literature is indisputably correct, but the parallel is even closer than he has made it.

LOUISE ROPES LOOMIS.

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The Social Basis of Religion. By SIMON N. PATTEN. New York, The Macmillan Company, 1911.—xviii, 247 pp.

The enthusiasm with which this book has been hailed in some quarters is due both to the nature of its doctrine and to the basis upon which it is constructed—the one social, the other economic. Dr. Patten presents a social religion, based upon the ideas of coöperation and mutual service, marking it off on the one hand from the religions of sacrifice, with their emphasis upon pain and "the deficit," and on the other from the "superman" ideal, which is as yet anti-social and anti-religious, but has both social and religious possibilities. His suggestion that social religion may yet gain even more from this egoism than it has from the self-effacement of humility, is both keen and helpful, for it gives a forward look that embraces all attitudes. The line of development is to be the *media via*, which includes joy in individual achievement and a merging of one's self into the commonweal. Christianity is connected by him with social religion by discarding all the theology and ecclesiasticism which are built on the idea of sacrificial redemption. The Pauline emphasis upon the death of Jesus was "necessary" in its day, in a world which understood religion in terms of sacrifice. But "the crucifixion was a temporary expedient, which hastened the changes that make Christ's social ideals workable. Christ's life was for the world. His death was for his age and its civilization" (page 200).

Such conclusions are doubly comforting to the social worker, because they are deduced from an economic survey of social evolution. The satisfaction, however, is marred when one examines the scientific apparatus which the author places before us. In the first place, the economic method of historical interpretation, as he sees it, "must leave out of account events so unimportant that their results cannot readily be determined. Every important cause is assumed to have one effect and each effect is imputed to a single cause" (page 23). Thus "the economist simplifies the problem [of morals] by assuming that sin is a consequence of misery. Remove misery and sin will disappear" (page 25)—an aphorism which, in more concise form, stands on the title-page as a sort of motto for the book. In the heart of the survey occur such generalizations as this: "The rise and decline of Mohammedanism showed what could happen to any civilization that has its base in the dry regions of the South" (page 202)! The South of Europe is pessimistic because it lacks natural resources, while the rich North is optimistic! This generalization is one upon which Dr.

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Patten hinges the major movements of the history of religion, and one wonders out of what sky he pulled it down. Literature, institutions, customs and every indication we have of popular feeling in fact point the other way. Sunshine counts for something as well as coal and steel. There are few Italian carnivals in the land of *Weltschmerz*. Even an economic interpretation of history can hardly interpret what it ignores. No student of the details of primitive society can subscribe to Dr. Patten's description of punitive religion as being a thing of vigor and joy (page 193)—a characterization he himself denies later (page 212). Nor can the historian agree that social evolution has been accompanied by "an increase of disease, war, famine and crime" (page 9). Dr. Patten subscribes to the doctrine of the fall of man, not because he has arrived at it inductively, but because that one generalization enables him to make others which accord with his theory.

There are two radical errors in this method. In the first place, one can never isolate social facts as one can chemical phenomena. A social fact does not exist except socially, and that means set into the heart of untold forces, no one of which is less real than the others. Moreover, unless there is a statistical basis for measurement, the extent not merely of the force but of the movement itself remains a mere matter of conjecture. Once historians were a good deal more confident than they are now that they knew what was involved in the fall of Rome, the Renaissance, Reformation, French Revolution, rise of national states *etc.* It is that patient study of detail, which Dr. Patten complains of as clouding our perspective, which has given us a marvelous correction of our perspective during the last generation.

The attempt to save a deductive philosophy of history by pragmatism is equally misleading. Our author admits that historical phenomena may be entirely misapprehended, but he maintains that they attain validity if they make society better. Here again "value" appears as an equivalent of "truth." But if you do not know in the first place what it is that creates the value, pragmatic tests cannot be made, because there is nothing to test. For instance: "The introduction of free trade into England so radically altered industry and commerce that its results could be easily perceived." So they could, before economists began to be aware of the compelling forces let loose by the industrial revolution. There are distinguished Englishmen now who do not give so much credit to free trade. The causes of the growth of British industry and commerce are manifold. Moreover, what economic force was it which caused an Englishman to invent that process for making steel which could not well be applied to England

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but brought untold wealth to Germany, at the very moment when Germany put on its protective tariff against England? Psychology has something to say as well as economics in the evolution of society. As for the social sciences finding a parallel to the "verification" of experimental science in the "value" to society of its phenomena, this is but another of those ingenious, apologetic fallacies which are springing up in the track of pragmatism. The hypotheses of social theory cannot be verified like those of natural science, for the verification has already taken place. It does not follow as the result of an experiment, each part of which can be measured with exactness. The causes of historical phenomena, therefore, cannot be determined in the same way, since we do not apprehend them as such before the event and they do not exist after it. But that does not justify any neglect to examine them in detail. We can at best grope toward the truth, and we can not even grope unless our hands are touching reality.

J. T. S.

The Psychology of Religious Experience. By E. S. AMES. Boston, Houghton, Mifflin and Company, 1910.—viii, 427 pp.

There is certainly much truth in the claim of psychologists that ignorance of their subject has often led students of the social and political sciences to hasty generalizations upon the causes and course of events, overworked theories of economic influences and the like. But the kind of psychology at present available is not of much service. Social psychology, in even such a good manual as that of MacDougall, is hardly more than an introduction into ethics. No psychological problems more directly concern the origin and growth of institutions than those of religion; but, although religious psychology has at last become definitely functional, it is still mainly directed toward the practical problems of modern religion and not to its relation with other social phenomena. Yet the subject invites coöperation and demands attention of all students of social evolution.

The book before us is perhaps the best general survey of its subject which has yet appeared. Objective and illuminating, though necessarily incomplete in its survey of the field of comparative religion, and not less frank in its analysis of the complex of emotions which forms religion, it is a book to be recommended. Dr. Ames has recognized the necessity for getting away from the rather Protestant aspects of most work hitherto available in this field, which has centered around "conversion," that climax of emotion in which the experience of "religion"

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seemed keenest. But he has not been able in so general a summary to indicate the wealth of the almost untouched fields of sacramental religion, which carry us much farther back into that world of taboo and magic, of attraction and recoil, of animal reactions in the most difficult of biological adaptations, than we can be taken by introspective emotionalists who record their anonymous experiences for psychologists. It is in this complex of sensations that we have the ultimate problem of the determining influences in social, judicial and political institutions. When religious psychology becomes catholic in the fullest sense, the heterodox sciences will be found more ready to learn of it.

Most interesting is the treatment of the social basis of religion. Here also, of late, much apologetic use has been made of pragmatism. If the absolute disappears, the dynamic criterion "value" offers a welcome synonym—or substitute—for truth. Then define religion as the highest social good, the thing embodying the highest values of society, and you have its "truth" demonstrated without more ado! Then it does not matter whether comparative religion shows any specific belief to be absurd or not. Jehovah may have evolved from the bull (chapter x), primitive Christianity may have been fed upon the blunders of an enthusiast whose message was by no means infallible, judged by pragmatic tests, but the theologian who faces these problems in the new way reduces the whole problem to one of social valuations. Dr. Ames avoids the extremes of his predecessors in this line of attack. He sees religion, not as a concentration of values, but rather as "a reflection of the most important group interests through social symbols and ceremonials based upon the activities incident to such interests" (page 49). This enables him properly to fasten upon "attention" as the major force in the complex. It leaves out the irrelevant and insoluble question as to whether the phenomena were good or bad. Crawley attempted to make the point that religion is a sort of emotional play about the vital functions, therefore beneficial, preservative and permanent. But it often stands for the most deadly social ills, and it seems frequently to mark failure rather than success in adaptation. Its dual character is stamped upon its taboos, with their curses and blessings all in one. With this our author seems mainly to agree, and his emphasis upon the colorless word "attention" is highly to be commended. But unfortunately the word "interests" is ambiguous. The "interests" of a tribe are not always to their interest. This ambiguity has left its blighting touch upon his whole treatment of the subject. Had he used another term, and kept his readers clear of the pragmatic attitude; had he as frankly controverted its obscurantism as he has rejected

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the overworked "subliminal" basis of religion, the book would have gained in breadth and power.

Finally, because religion in primitive life included the whole science of living, can we arrogate to it today so wide a scope? Is there no process of secularization in the progress of social evolution? Can religion always stand for "the consciousness of the great interests and intensified purposes of life in their most idealized and intensified forms" (page 287)? If so, the social sciences become an adjunct to theology —that is, to the new theology. This seems to be a partisan point of view. Dr. Ames is too sober to follow out his suggestions, but he may be assured that others will. May they profit from his courage and openmindedness, and from the critical insight and breadth of view which this work exhibits.

J. T. S.

History of Economic Thought. By LEWIS H. HANEY. New York, The Macmillan Company, 1911.—xvii, 567 pp.

It has long been a reproach to English-speaking peoples that there has been no good history of economics. Ingram's is only a cyclopedia sketch; Cossa's is an annotated bibliography; and the other alleged general histories are for the most part unworthy of serious consideration. It is therefore a matter for congratulation that Professor Haney should make available to students a sound and sensible summary of the chief contributions to economic thought. The book is said by its author to be based largely on the manuscript lectures of Professor Ely, some of the chapters being in great part due to him; but the independent contributions of Professor Haney are so numerous that the book is published under his name.

The work has much to commend it. It displays a considerable acquaintance with the important literature of economics. Its statements are accurate; its comments are sound, so far as they go; and it is not wanting in balance. It will, accordingly, be found useful.

Too much, however, is claimed in the title. An attempt to compress the history of economic thought into five hundred and fifty short pages is bound to be unsatisfactory. The book should be called a sketch of the history or an introduction to the history of economics. And even as a sketch it is inadequate. Although it purports to be written for advanced students, there is really almost nothing new in it, and little that cannot be found in existing foreign manuals. The earlier chapters dealing with economic thought before the science of economics are inadequate both in content and in reference to

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the available authorities. Especially so far as England is concerned, the rich literature of the period before Adam Smith is almost wholly disregarded. A history of economic thought which is silent, for instance, about the economic controversy between Malynes and Misselden—neither of whose names is even mentioned—can scarcely be regarded as satisfactory. Moreover, not only is the lack of independent investigation apparent throughout the work, but it is not even abreast of recent research. Gournay, for instance, is still classed with Quesnay as though the modern literature on this subject had never been written. The treatment of newer French economics, also, is sadly deficient. To the eighteenth-century German cameralists, on the other hand, some space is devoted, evidently because German writers have been speaking of them for decades, but equally important writers in France and England are neglected because until recently no one seems to have paid much attention to them. When one reads in the preface that "it is perfectly obvious that the writer of a book of this kind cannot have read carefully and completely all the works he mentions," one cannot help asking: what proportion of the books did the author read and what proportion does he quote at second hand? How far is the work to be considered a compilation and how far an independent production?

Furthermore, although we are told in the preface that in dealing with each economist the plan will be to indicate "the pertinent circumstances of his environment," the promise has not been adequately kept. In fact a great defect of the work is the lack of correlation between the particular theory and the institutions of economic life which were responsible for it. We search almost in vain for any illuminating or suggestive thoughts on this relation.

It is open to serious doubt whether the history of economic science can be successfully written by a comparatively young man. The historian of economic thought should be a man who not only has himself made distinguished contributions to economics, but who possesses the ripeness of judgment, the breadth of view and the poise of intellect that almost never come until after a long familiarity with the subject. A history of any one of the natural or mathematical sciences can, perhaps, more easily be written by a man of less maturity; but economics is so subtle, so profound, so far-reaching in its implications, that it is of all the sciences the most difficult to describe in its historical evolution.

One of the chief duties of a historian is to be accurate in his names and titles. The work before us is unfortunately deficient in this respect. Misprints abound; *e. g.* Manly (page 102), Hadly (page 191), Whittaker (page 216 and 556), Pastuage (page 134), Esprit du

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lois (page 135), ordre naturelle (page 139), dispanses (page 146), upon (as a French word, page 148), Aftalon (page 506), Beuregard (page 507), der geschichliche Methode (page 163), Besteurung (page 212), Fancher (page 260), einege (page 416), Davanatzi and Montonari (page 100), il sistemia (page 491). Some of these mistakes—the list could easily be multiplied—are no doubt due to slovenly proof-reading; but even then they are too numerous to be pardonable.

Taking it all in all, therefore, while Professor Haney's book may be called a creditable manual, well calculated to serve as an introduction for the beginner, it still leaves the field open for a thorough, mature, well-rounded and satisfactory history of economic thought.

E. R. A. S.

Le Commerce extérieur et les tarifs de douane. By AUGUSTE ARNAUNÉ. Paris, Félix Alcan, 1911.—iii, 532 pp.

System der Welthandelslehre. By JOSEF HELLAUER. Volume 1, part 1. Berlin, Puttkammer and Mühlbrecht, 1910.—xvi, 482 pp.

Under a somewhat misleading title, the first of these books gives an account of the tariff policy of France from the time of Colbert to the present day. The work is, to a very large extent, a compendium of the tariffs passed by the different legislative bodies of France, of the commercial treaties concluded between France and other countries, and of the laws which have governed the French merchant marine and the commerce of the French colonies. Professor Arnauné devotes too much space to the detailed enumeration of statutory provisions, of rules and regulations, particularly when dealing with the earlier phases of French history, and he fails to bring out the essential characteristics of the succeeding periods which he considers and the important features of the measures passed in each of these periods. One seeks in vain for either a thorough analysis of the forces which shaped the commercial policy of France or a clear presentation of the effects of this policy upon the industrial life of the nation; the author confines himself to enumerating acts, giving excerpts from parliamentary debates, citing statistics of imports and exports and proclaiming the infallibility of the free-trade dogma. The arguments advanced by David Hume, Adam Smith, Quesnay, J. B. Say and Bastiat are restated, in order to prove that the position of the modern protectionists—whose doctrines, in the author's opinion, have not changed since the enunciation of the mercantilistic theory—is untenable. By means that are scientifically

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crude, the author reaches a conclusion which seems to be correct: that protectionism does not possess the superiority which is claimed for it, and that, far from being beneficial to France, it prevents her from attaining in the world's production and commerce the place which should be hers by reason of her exceptional wealth of industrial ability and of capital.

Professor Arnauné's book may be recommended to those who are in search of a painstaking chronological summary of facts and events.

Professor Hellauer's work—which is to consist of two volumes—is the result of academic teaching, and its prime object is to serve as a text-book and hand-book for students in commercial colleges and for others who wish to acquaint themselves with the complicated machinery of modern business. It treats of the means at the disposal of importers and exporters and of the methods used by them, showing how they organize their forces and how they conduct their selling campaigns. A large part of the book is devoted to a discussion of the nature and of the contents of business documents and to an explanation of the various terms and conditions under which contracts are concluded. Judged by this first instalment, which constitutes the major part of the first volume, the treatise promises to be an exceptionally complete and thorough study of the technical business aspects of the world's commerce.

Professor Hellauer does not discuss questions of public utility but confines his attention to problems of private character and interest. In dealing with these he shows ample knowledge of the subject. When he attempts to theorize, his opinions are less tenable. In his introductory chapter on commerce and its forms, he attributes to "marginal utility" the difference in the valuation of goods at different places and at different times and presents commerce as one of the resultants of this difference in valuation; later, he speaks of commerce as creating values. In enumerating the most important factors that determine the ability of industries to compete in the world's markets, he includes protective tariffs. In his opinion productive activities which depend upon export trade alone "are built on a foundation of clay"; adverse tariff legislation in the leading importing countries may overthrow them. The home market is the only one that insures steady development; but, if this market is protected, protection may become a source of competitive strength by permitting manufacturers to sell cheaper abroad than at home.

SIMON LITMAN.

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The Purchasing Power of Money: Its Determination and Relation to Credit, Interest, and Crises. By IRVING FISHER, assisted by HARRY G. BROWN. New York, The Macmillan Company, 1911. —xxii, 505 pp.

"The main contentions of this book are at bottom simply a restatement and amplification of the old 'quantity theory' of money" (page vii). In such fashion Professor Fisher sums up the results of an extensive investigation, which is notable not less for originality than for thoroughness.

In order to secure an effective line of attack upon his problem, the author uses what he described to the American Economic Association as an algebraic expression of the quantity theory. His "equation of exchange" — $M\,V + M'\,V' = P\,T$ — means that the quantity of money in circulation, multiplied by its velocity of circulation, plus the quantity of deposits subject to check, multiplied by its velocity, equals the volume of trade, reckoned in physical units, at the general level of prices. After the style of his earlier books, Professor Fisher first elaborates an *a priori* proof of this equation, and then provides an inductive verification (page 276). The gist of the latter is a statistical investigation covering the years 1896 to 1909 in the United States. The P's in the equation, that is, the price levels, are computed for these years in two ways: first, directly from index numbers for the prices of commodities at wholesale, of stocks and of labor; second, indirectly, by striking the quotients of $\frac{M\,V + M'\,V'}{T}$. The two sets of results are found to agree closely with each other. The degree of correlation between them is decidedly higher than that attained in the corresponding investigation by Professor Kemmerer.

Pleased as he is by the neat outcome of his tables, Professor Fisher admits that the "results should be understood as a confirmation, not of the equation by the figures, but of the figures by the equation" (page 298). Indeed, the equation of exchange needs no inductive verification; for it is no more than an algebraic statement of the truism that the sums of money and checks expended in buying goods during a year must equal the aggregate sums charged for goods. Aside from trifling exceptions, which may arise in connection with international trade or with goods bought one year and paid for later, the equation is so obviously valid that to expend labor upon a statistical proof is a work of supererogation.

In the course of these researches, however, Professor Fisher has

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turned out several by-products which redeem his statistical work from futility. He has invented and applied an ingenious method of estimating the velocity of circulation of both money and checks. It appears that the latter velocity is substantially double the former; that the velocity of check circulation, at least, is accelerated by business prosperity and retarded by depression; and that, apart from these cyclic oscillations, both velocities—particularly that of checks—have increased since 1896. Again, he has provided the first American estimates of the quantity of deposits subject to check. He has improved upon Kemmerer's general index number of the price level and upon the same investigator's estimate of the physical volume of trade. He has shown that the country's foreign commerce is less than one per cent of its domestic business. Finally, he has ventured a quantitative statement of the relative influence exercised by money, deposits, velocities of circulation and volume of trade in determining the recent rise of prices.

Marked as is the advance Professor Fisher has made in the quantitative treatment of these matters, his figures are susceptible of further improvement. For example, the reasons he assigns for omitting retail prices from his general index number (pages 226, 227) seem inadequate; his estimate of deposits subject to check can now be bettered by using Barnett's new tables of the number of banks other than national; and his method of estimating the reserves of banks which do not report to the comptroller of the currency (page 433) is ill chosen. But these are minor points, and it is not probable that a revision of the detailed figures would appreciably alter the general results.

In the midst of the statistical verification, Professor Fisher candidly reminds the reader that "to establish the equation of exchange is not completely to establish the quantity theory of money, for the equation does not reveal which factors are causes and which effects" (page 298). Of course, this problem of causation is the chief concern of one aiming "to set forth the principles determining the purchasing power of money." Accordingly, it forms the central theme of the first half of the book. The conclusion reached is that the level of prices "depends exclusively on five definite factors: (1) the volume of money in circulation; (2) its velocity of circulation; (3) the volume of bank deposits subject to check; (4) its velocity; and (5) the volume of trade" (page vii). That is: "The price level is normally the one absolutely passive element in the equation of exchange" (page 172). The other five elements in the equation act upon the price level and upon each other and in turn are acted upon by a large num-

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ber of outside factors. But the price level cannot normally act upon the other elements, nor can it be acted upon by any outside factor, save in so far as the latter modifies some one of the other elements in the equation.

Great stress is laid in this discussion upon the word "normally." For, in sharp contrast to its strictly passive role in "periods of equilibrium," the price level is held to function actively as a cause during "periods of transition." When for any reason prices begin to rise, interest advances, but not fast enough to offset the decline in the purchasing power of the money in which loans are repaid. Borrowers therefore profit at the expense of lenders. Hence bank loans expand, and with loans deposits subject to check. The increased volume of this currency

> still further raises prices, a result accentuated by a rise in velocities though somewhat mitigated by an increase in trade. When interest has become adjusted to rising prices, and loans and deposits have reached the limit set for them by the bank reserves and other conditions, the fact that prices no longer are rising necessitates a new adjustment. Those whose business has been unduly extended now find the high rates of interest oppressive. Failures result, constituting a commercial crisis. A reaction sets in; a reverse movement is initiated. A fall of prices, once begun, tends to be accelerated for reasons exactly corresponding to those which operate in the opposite situation [page 73].

Normally, then, the price level "is controlled solely by the other elements [in the equation of exchange] and the causes antecedent to them, but exerts no control over them" (page 172). But in transition periods fluctuations in the price level react upon the amount of deposit currency, affect the volume of trade, stimulate or retard the velocity of circulation and (to extend Professor Fisher's logic) influence the quantity of bank notes, if not of other kinds of money in circulation (chapter iv).

A critical reader cannot forbear to ask what is the relation between these periods of transition, when "abnormal oscillations" (page 70) occur, and the periods of equilibrium, when normal conditions obtain. He finds his answer in such statements as the following. The italics are not in the original text.

> While the pendulum is continually seeking a stable position, practically there is *almost always* some occurrence to prevent equilibrium. Oscillations are set up which, though tending to be self-corrective, are *continually perpetuated* by fresh disturbances (page 70).

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Since *periods of transition are the rule and those of equilibrium the exception*, the mechanism of exchange is almost always in a dynamic rather than a static condition (page 71).

The proposition that prices vary with money holds true only as between two *imaginary periods*, for each of which prices are stationary or are moving alike upward or downward and at the same rate (page 159).

In such passages Professor Fisher suggests that what is normally true concerning the determination of prices is seldom true in fact. Most of the time—the reviewer believes all of the time—the price level both affects and is affected by the other elements in the equation of exchange. The most serious blemish in Professor Fisher's theoretical work is that it thus represents that which is happening most of the time as "abnormal," and puts the stress upon conclusions concerning conditions which are admitted to occur but seldom.

But this is a blemish only from the realistic viewpoint of one who seeks to understand the actual economic processes by which the purchasing power of money is determined. As a loyal devotee of the mechanical type of economic theory, Professor Fisher himself is not in the least troubled because his theory of the normal case is not a theory of the general run of the facts. As he puts it: "The *tendency* represented in the quantity theory remains true, whatever happens to the other elements involved. . . ." And he adds: "A scientific law is not a formulation of statistics or of history. It is a formulation of what holds true under given conditions" (page 320). To which one can only reply that we want most to know what holds true under the conditions which actually exist, and that for this purpose Professor Fisher's theory of the "abnormal oscillations" which occur in "transition periods" is of more help than his theory of the normal case. Moreover, the common methodological excuse for using the normal case as a device to simplify in imagination the complex conditions of reality does not seem valid in the present instance; for the author is able to discuss the intricate business processes of his "transition periods" without such artificial aid. Had he conducted the whole investigation by the methods used in chapter iv, he might have made a contribution of the first order toward our understanding of contemporary economic life.

To the reviewer, then, chapter iv is that portion of the book which most richly repays serious study. Not alone investigators concerned with the purchasing power of money but also those concerned with business cycles must give it close attention. To appraise the conclusions justly within the space here available is impossible, because of

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the wide scope of the problem and the originality of the treatment. But the question may be raised whether Professor Fisher might not improve his work by paying more attention to certain other factors similar in character to the lagging adjustment of interest rates to changes in the price level. Is not the lagging adjustment in wages, upon which Veblen lays stress, at least equally important in breeding crises? Are not the dissimilar fluctuations in the prices of raw materials and finished products to be taken into account? Are Sombart's suggestion concerning the prices of organic and inorganic products and Carver's suggestion concerning the prices of consumers' and producers' goods altogether wide of the mark? In fine, when an economist finds that differences between the fluctuations of the prices paid for commodities and the prices paid for loans affect the fluctuations in the purchasing power of money, can he stop short of looking for similar effects arising from lack of close adjustment between the fluctuations characteristic of other parts of the whole system of prices?

A third notable feature of the book remains to be mentioned. In the concluding chapter, Professor Fisher proposes a way of avoiding the ills which now result from variations in the purchasing power of money. His plan involves an ingenious "combination of the tabular standard with the principles of the gold-exchange standard" (page 337). To describe the scheme adequately would require too much space, and a brief statement would not make clear its merits. No one interested in scientific monetary reform should neglect to read the whole discussion.

WESLEY C. MITCHELL.

UNIVERSITY OF CALIFORNIA.

Public Ownership of Telephones on the Continent of Europe. By A. N. HOLCOMBE. Boston, Houghton, Mifflin and Company, 1911.—482 pp.

This book (for which the author received the David A. Wells prize at Harvard University in the year 1909–10) has a much broader interest than might be inferred from the title. It is not concerned only with the question of public or private ownership; it discusses questions of rates, service and business organization that are as important in connection with a system of private ownership under public regulation as with a system of public ownership. The book is of great value to anyone interested in the telephone industry from the viewpoint of public control. It bears evidence of careful research and investigation at first hand in the countries to which it relates. The author states that he

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has simply tried to set forth without prejudice the results of European experience. His aim "is not to show that a particular mode of conducting the telephone business—say free competition or public ownership—is in the abstract the best, but to show how in practice various forms of industrial organization actually have worked."

Of countries on the continent of Europe, only Spain and Denmark cling to the system of private ownership. The transition to public ownership has only recently been completed in Italy and is still under way in the Netherlands, Norway and Sweden. In France, Belgium, Austria and Hungary the government monopoly has been exclusive for more than a decade, and in Germany and Switzerland the principle of government ownership has been applied practically from the start. The important fact in the development of public ownership of telephones in Europe was the existence of the government telegraph systems. These had themselves been established originally for military and political reasons. The telegraph and telephone are so closely related that in Germany and in Switzerland the telegraph authorities almost immediately saw the desirability of including the telephone in the telegraph system. Outside of Germany and Switzerland, no European administration was willing to take upon its own shoulders the task of building up a telephone business. "All with one accord declined to attempt the initial risks, preferring to turn over to private enterprise the responsibility for the adjustment of the new means of communication to its proper place in business and social life." The author considers the advantages and disadvantages of this policy; and the evidence seems to show that the authorities in Germany and Switzerland adopted a wiser course in immediately taking over the telephone business.

The author discusses at greatest length the origin and workings of the public telephone systems of Germany, Switzerland and France. He gives much attention to the technical development of the business by the public authorities and also to the relations between the telephone and other branches of the electrical industry, arising largely from the problem of electrolysis. He considers also at length the theory of telephone rates and the development of the rate policy of the public telegraph administrations, including the original flat-rate system and the later introduction of measured service. He approves the policy of the German telephone administration in applying surplus profits obtained from the large urban users to the extension of the telephone to rural districts. Under this system rates are based on the value of the service rather than on its cost. Rates are so to be adjusted as to secure a maximum of utility to the community as a whole.

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Dr. Holcombe describes and commends the system worked out in Germany for the representation of the consumers in the administration of the telephone business through the instrumentality of the chambers of commerce. He deals at length with the labor situation under public ownership. Even in Germany the question of the relation of the wage-earner to the industry has not been satisfactorily worked out. The German telephone employee

> must surrender not only his right to associate with his fellows for the purpose of mutual assistance in promoting their common interests as wage-earners, but also his liberty to exercise the fundamental privileges of citizenship, the liberty of expressing his views on political questions and of playing a part in the politics of his country.

Public ownership has failed most frequently in the matter of financial support. The author shows how in France the failure of the government to provide sufficient funds for construction, betterments and extensions has crippled the service and retarded development. A private company can secure funds for any enterprise that is economically sound. The government, however, cannot act in this way. The finances of the state must be considered as a whole; and if annual deficits are the rule and the debt burden is constantly increasing, it becomes very difficult to appropriate adequate funds for the development of the telephone enterprise.

A chapter is devoted to a comparative study of the development of telephone service. In the author's opinion:

> The prime significance of the statistics of comparative telephone development in Germany and in the United States is not that the German government has managed its telephone business with less enterprise and sagacity than has been displayed by the private companies in the United States but that the German people have less use for the telephone than have the Americans.

A final chapter deals with the economy of public ownership; and, after discussing the pros and cons, the author reaches the conclusion that

> the great merit of public ownership, . . . as an agent of production, is that under the proper industrial conditions it fulfils more economically than any other method of industrial organization the direct purpose of production—that is, the supply of the consumer with the kind and quantity of goods that he desires.

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As to actual experience under public administration, he concludes "that the German and Swiss telephone authorities have maintained a telephone service that has been both adequate in quantity and satisfactory in quality"; while on the other hand, the French telephone authorities "have not succeeded in maintaining either an adequate quantity or a satisfactory quality of telephone service nor in establishing their rates on a reasonable basis."

ROBERT H. WHITTEN.

PUBLIC SERVICE COMMISSION, NEW YORK CITY.

Greek Immigration to the United States. By HENRY PRATT FAIRCHILD. New Haven, Yale University Press, 1911.—xvii, 278 pp.

Greek immigration to the United States is distinctly a twentieth-century movement. Starting in the farming districts of the Peloponnesus after the failure of the foreign market for the principal export crop, the Greek currant, it spread with remarkable rapidity throughout the agricultural regions of Greece and the Greek settlements of European and Asiatic Turkey. "It is a radical, violent exodus of all the strong young men, which has already devastated whole villages, and threatens to leave the entire kingdom depleted of its natural working force." No less than 210,000 Greeks came to America during the decade 1901 to 1910, and of these a trifle over 95 per cent were males. Doctor Fairchild's work is a pioneer study of this movement, based very largely upon personal investigation both in Greece and in typical Greek colonies in the cities of the United States.

In the first part of his book, dealing with conditions in Greece, the author succinctly describes the physical environment and the obvious social consequences thereof; devotes a couple of chapters to a general discussion of the national character, religion and language; and then enters into the more particular field of his study with an admirable analysis of the direct causes of emigration. Neither in social nor in political disabilities nor in religious dissension does he find any adequate explanation of the migration; it has its origin in purely economic motives. The author sums up the situation as follows:

> The conditions due to the meager industrial development in Greece have within recent years been accentuated by a marked agricultural depression. This has made it very difficult for the ordinary peasant to secure even a moderate return for his labors. The marked rise in prices, which for various reasons has occurred contemporaneously with the decline in the agricultural market, has added to the burdens of life until they have be-

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come very heavy. The Greek peasants have accordingly been led to look for some new field of effort where there are greater returns for labor, and have found it in the United States. The motives for the new emigration are practically without exception of a financial nature, and may be concisely expressed in the answer to his queries which one constantly receives from the Greeks themselves: "We go to America because we can get more money there."

In the second part of the book, "The Greeks in the United States," Doctor Fairchild briefly reviews the federal statistics of Greek immigration, and discusses at length the economic and social conditions in the large Greek colonies of New York and Chicago; in Lincoln, Nebraska, as representative of the smaller Greek settlements; and in Lowell, Massachusetts, as characteristic of the colonies in the manufacturing centers of New England. Everywhere the Greeks are found to be eminently successful in the management of candy kitchens, ice-cream parlors, flower shops, restaurants and lunch counters, fruit stores and bootblacking establishments. Great numbers of them find employment in these minor industries and in hotels; comparatively few are factory workers or outdoor laborers; practically none are engaged in agricultural pursuits, notwithstanding the fact that most of them come from the farms of Greece. In the bootblacking business, where the padrone system exists at its worst, and as contract laborers in the railroad gangs of the West, the Greek immigrants suffer outrageous exploitation at the hands of their own countrymen. But no matter how disadvantageous the conditions under which they work, they make money and they save money. Generally, however, this is done at the cost of untold privation; and the living conditions among the Greek men are wretched in the extreme and are characterized by everything that is unhygienic and socially undesirable.

The whole picture drawn by Fairchild is of an industrious, adaptable and thrifty lot of men who, because of apparent over-taxation of our assimilative powers, are centering in our already congested cities in groups as alien and apart as any within our borders. America is making no use of aught except their labor; the Greek immigrants themselves are paying a heavy price for their financial success; and little Greece has already been deprived of between a fourth and a fifth of its normal working force.

It is a comprehensive study that the author has made, and one which constitutes a real contribution to our knowledge of twentieth-century immigration problems.

ROYAL FREEMAN NASH.

NEW YORK CITY.

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Makers of Our Clothes: A Case for Trade Boards. By MRS. CARL MEYER and CLEMENTINA BLACK. London, Duckworth and Company, 1909.—xv, 304 pp.

This volume presents arguments in favor of establishing minimum-wage boards in the English clothing trade. It is the result of a year's investigation into the work of women in London in the tailoring, dressmaking and underclothing trades. The movement for the wage boards grew out of the exhibition of conditions in the sweated trades made by the *Daily News* in 1906, which stimulated the formation of the Anti-Sweating League. This association brought the movement into the sphere of practical politics, and within a period of a very few years it succeeded in securing minimum-wage boards in four trades. In the heated discussion of these matters, it was essential to have exact information on the conditions existing in the industry. The Anti-Sweating League therefore instigated the inquiry of which this book reports the results. It is manifestly designed to prove how powerless are the workers to secure a living wage without the aid of some official agency to check the relentless pressure of unlimited competition. The hardships of the employer, particularly of the small manufacturer, under the present economic system are noted, but the bulk of the book deals with the sweated condition of the labor force. The writers contend that some solution must be found in order to stop underpayment in so large a body of unorganized workers.

The method of the inquiry was simple, although it required an enormous amount of work. Individual workers in three trades, namely, tailoring, dressmaking and the production of underclothing, were interviewed in their homes. The workshops also were visited. The workers interviewed were employed in factories of various degrees of importance, from the most modern, equipped with power-driven machinery, to the smallest workshop of the middleman. Investigators also collected the histories of several hundred "out" or home workers. All the testimony thus obtained goes to show that the conditions in these trades are deplorable. There is no standard wage; there is hardly what might be called a current wage. All the evils of seasonal employment and of unemployment are unrelieved by any rational effort to secure continuity of work. In the best branch of the trade,

> in the West End tailoring trade, women are, as a rule, paid 4*s.* to 5*s.* for a day's work. . . . But the season extends over not more than half the year, and during much of the other half slackness deepens into unemployment. We doubt whether the average wage of the first-class tailoress, taking the year through, often exceeds 15*s.* weekly.

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Waistcoat makers are somewhat better off, an appreciable number earning from 18*s*. to 20*s*. a week. Of these, the writers say: "They are the millionaires of women's industry—persons who actually earn enough to house, feed, and clothe themselves healthily, and have a small sum in hand after the necessaries of life have been provided." At the other end of the scale are the shirt makers, whose condition is the worst. They have not bettered their condition appreciably since the days of "The Song of the Shirt." One of the women visited made 9*s* a week working full time; nor was this apparently an exceptional case.

The comparison of the earnings of home workers with those of factory workers is made difficult by the fact that many home workers are only partly employed in industrial labor. The writers unfortunately can give no estimate of the relative numbers of factory workers, full-time home workers and part-time home workers. The figures on wages and unemployment are based almost entirely upon the statements of the workers. It is to be regretted that this evidence should not have been more fully substantiated by the study of individual factory pay-rolls. Moreover, the information, such as it is, is not presented in statistical form.

It seems strange that in so full a discussion of home work there is no mention of child labor. This omission is hard to understand, since the pressure of poverty is said to send children of fourteen to factories and workshops. If conditions in London at all resemble those in New York, we should expect the employment of even younger children in home work.

Despite its defects, the book is an excellent piece of work. It shows not only insight but keen sympathy, and it is admirably written. In its principal recommendation, the report departs radically from the government bluebook on Home Work, which would have wage boards set prices only for home workers. The authors maintain that factory hands as well as home workers need the protection of minimum-wage boards and that, if home workers alone were protected, it would in reality be a disadvantage to them and drive them out of the industry. If, on the other hand, wages were fixed for both sets of workers, it is argued that employers would still continue to use outside help on account of the saving in running expenses, rent, up-keep and superintendence.

Since this book was written, wage boards have been established by law for the clothing trades, and these boards are about to publish minimum wages for both factory and home workers. The results of the new regulations will soon be evident and may perhaps settle the controversy. But there remains the further question as to the ultimate

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effect of the new legislation upon home work. Is it likely that the fixing of a legal minimum wage can in the long run be used to suppress this most undesirable form of labor? It is abundantly evident that our writers do not regard this solution as desirable. They do not even discuss the proposition, and clearly show that they do not wish to face the issue. Apparently, they fear the immediate hardship to the workers that would result from a radical attack upon an economic system so firmly rooted.

PAULINE GOLDMARK.

NEW YORK CITY.

Preventive Agencies and Methods. By CHARLES RICHMOND HENDERSON. New York, Charities Publication Commitee, 1910.—416 pp. and index.

In the last one hundred and fifty years the attitude of society toward its defective and antisocial members has been changing from pure superstition to relatively pure science. We are, as yet, just entering upon the latter stages of the process, but we have reason to believe that the final transformations will be rapid. It is a long step from the idea of "possession by the Devil," with its accompanying methods of extermination, to the conception of abnormal physical condition and antisocial conduct as disease, with possible cure or reformation. It is a still longer step to the recognition of degeneracy and to the idea of social protection by segregation. But while we are trying to adjust ourselves to this new view-point, another advance is being made. The application of the laws of cause and effect to the study of pathology in physical conditions and in conduct is giving rise to the new but relatively well developed science of prevention. The volume under review is a milepost in one of the last stages of this advance. It is one of four volumes on the general subject of correction and prevention, prepared by Professor Henderson for the eighth International Prisons Congress.

The author is justified in claiming: "In quite a literal sense we offer here a source-book on the subject." Almost no movement or scheme for the improvement or removal of conditions conducive to criminality has been overlooked. Each receives as full consideration as is possible in a single volume. The material has been carefully sifted. The book is relatively free from rash statements dictated by enthusiasm and insufficiently controlled by a scientific study of conditions. A few rather exaggerated conclusions are presented, however, with reference to methods of improvement, in cases in which scientific measurement of results is well-nigh impossible.

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The following general topics are considered, in as many chapters: (1) the humane but effective elimination of the incurably anti-social who are dangerous by reason of their conduct or their ability to propagate defect; (2) the removal of conditions conducive to defective personality; (3) the amelioration of economic conditions conducive to crimes of misery or of ambition; (4) the control of specific social evils conducive to crime; (5) treatment with a view to averting evil acts by a substitution of attractive normal conduct; (6) the removal of defects in the law and of defects in the administration of law which are conducive to its violation; (7) improvement of education as a deterrent influence; (8) crime viewed as an abnormal means of gratifying human desires, and its prevention by the substitution of higher interests and legitimate satisfactions.

In the treatment of each topic the author attempts to make as clear as is possible, within the limits of a single volume: (1) the nature and extent of the social injury to be prevented; (2) evidence that competent specialists are aware of the peril to which the nation is exposed; (3) proposals for amelioration in preventive measures; (4) actual organization and experiments; (5) results obtained, so far as materials for a judgment can be obtained.

One of the most significant features of the work is the evidence it affords of a widespread and increasingly clear perception of the importance of prevention. An abundance of material, brought together for the first time from a multitude of sources, testifies to the growing conviction that the alleviation of present misery, however great, must be deemed secondary to the prevention of infinitely greater misery yet to come.

To Herbert Spencer is attributed the statement that humanity goes right in the long run after having tried all the ways of going wrong. The fact that the compilation of such a volume as this is possible at this time encourages the hope that the end of our period of experiment in the treatment of crime is not indefinitely remote.

PHIL. A. PARSONS.

SYRACUSE UNIVERSITY.

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BOOK NOTES

The present period is prolific in discussions of the possibility of organizing the world for the purposes of permanent peace. Some of these discussions are superficial or purely sentimental, while others are of a philosophical and more serious nature. In the latter category belongs *A Short History of War and Peace* (New York, Henry Holt and Company, 1911; vi, 256 pp.), by G. H. Perris. In small compass Mr. Perris gives a broad and rapid survey of the movements of the human race and of its various forms of social and political organization from the earliest times. He does not consider war as a necessary and permanent institution, arising out of the nature of man. On the contrary, he maintains that the nature of man as a social being, far from being based upon unchangeable passions, is based upon material and moral interests that have undergone deep changes, which, although irregular, have proceeded in a certain general order and direction. Despotic and predatory governments, based on a slave economy, were succeeded by the feudal system, based on a land economy, which later gave way to a trade economy. Out of this has developed the credit economy, which has stimulated the organization of labor and which is reflected in the growth of democratic governments, impelled towards the organization of settled peace by means of armed alliances, arbitration treaties, common administrations and quasi-legislative congresses, while, as the most startling result of the conjoint influences of the era of industrial democracy, we find an arrest of the growth of population. Mr. Perris does not maintain that these stages present a precise chronological order. There have been, as he admits, irregularities and interruptions, with a strong tendency at times to revert to less advanced conditions; but he considers it to be the great task of the twentieth century to remove the fear of war and the burdens of preparation which it entails, by the organization of a settled peace.

Perhaps no book written in the interest of peace has in recent times attracted more attention than the *Memoirs of Bertha von Suttner*, of which we are now to be congratulated on having an authorized English translation (Boston, Ginn and Company, 1910; two vols., xiii, 448 and x, 443 pp.) The author's story contains elements of personal romance, as well as discussions of various aspects of the peace problem. It is gratifying to note that it is in "the great community of the English-speaking nations" that the author finds that the final victory of

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the peace movement "is being most efficiently hastened." In the United States she observed "that remarkable things were taking place." As she wrote her preface, in Vienna, in 1910, she saw "the most prominent men in the Union—Taft, Roosevelt, Elihu Root, Knox *etc.* —coming forward with positive proposals for the organization of the world." Since these words were written the pending general arbitration treaties, between the United States on the one part and France and Great Britain on the other, have been concluded. The comments of Colonel Roosevelt upon these treaties have not been favorable. It is not necessary to assume, however, that the harmonious ardor in favor of world-organization, which seemed to promise so much, has undergone any abatement or disturbance.

The First Book of World Law (Boston, Ginn and Company, 1911; v, 308 pp.), by Raymond L. Bridgman, embodies various international acts which, in the editor's opinion, show that "a new era has opened in the relations of nations." At the second Hague Conference there was, as he states, "distinctly before the minds of the delegates the prospect of future conferences upon broad lines, sufficient to include all the nations with organized governments; and out of that development promises to come the organized political unity of mankind." The first Hague Conference established the court of arbitration; the second, "an international prize court, which promises to be the historical germ of the world's judiciary"; and these gatherings have, as the editor believes, "inaugurated, beyond reverse, a new era." Meanwhile, there has been gradually forming what he calls a body of world law, which it is the object of his volume to present. To this end he has compiled various international conventions to which the principal nations of the world are parties, with notes briefly explaining their significance. They include the universal postal union, the Hague convention for the pacific settlement of international disputes, the international convention concerning the rules of navigation, the international sanitary convention, the union for the protection of industrial property, the Brussels convention for the suppression of the slave trade, the Geneva Red Cross convention, and the international convention concerning wireless telegraphy.

Inspired by kindred thoughts is *Public International Unions* (Boston, Ginn and Company, 1911; pp. viii, 189), by Professor Paul S. Reinsch. It is not, however, a volume of documents, but is what the author calls a study in international administrative law. While the older pacifism looked upon war as an evil entity to be combated directly, yet war is, in his opinion, "only the symptom of a general

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condition in which too great emphasis is still laid upon local interests"; and the only way in which the conditions that give rise to war can be removed is by "the building up of an international consciousness." This end is being attained, and "a positive content of the feeling of a common humanity is being provided," through "the creation of international organizations for all the interests of human life." This is what the author terms the new internationalism. In the sense indicated, he describes the development and organization of international unions affecting communication by post and telegraph and transportation over sea and land; economic interests, embracing weights and measures, industrial and literary property, agriculture, insurance and labor; sanitation and prison reform; matters of police, relating to fisheries, submarine cables, the slave trade, liquor traffic and the white-slave traffic; and scientific purposes. He gives a special chapter to the International Union of American Republics. In conclusion he maintains that the international organization now in process of formation is not hostile to national life and development, but that the "universal factors have in our era become of prime importance," that they have "transformed the character of diplomacy," and that they "are filling the entire world with that spirit of coöperation upon which real advance is dependent." Without intending to combat the proposition that there exists, as Mr. Bridgman and Professor Reinsch contend, a clear tendency towards the international organization of interests, it is only proper to point out that for the most part such organization relates only incidentally to the question of international peace and war and bears on that question only in the sense in which the internal organization of the state bears upon the question of civil war. In both cases organization, if it be suitable, tends to preserve peace.

In the fourth edition of *The Principles of International Law* (Boston, D. C. Heath and Company, 1910; xxi, 745 pp.), by T. J. Lawrence, we have, with material changes and revisions, a new version of a standard manual. The original divisions are retained, but much of the old matter has been replaced with new, and there have been considerable excisions and additions. What with the various wars and international conferences during the past fourteen years, one has had to go at a rapid gait in order to keep pace with the progress of events and of legal developments in the international sphere. Dr. Lawrence has always shown in his writings an aptitude for discerning the political as well as the strictly legal bearings of international transactions; and the present publication is of especial value in fitting the rules laid down in recent law-making documents into their proper places among the

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principles which form the foundation of the subject and which must be thoroughly understood in order to grasp the meaning and effect of the later acts of international legislation.

Professor George Grafton Wilson, of Harvard, has written for the Hornbook Series a *Handbook of International Law* (St. Paul, West Publishing Company, 1910; xxi, 623 pp.). It is divided into six parts, relating respectively to "persons" in international law, to general rights and obligations, to the intercourse of states, and to international differences, war and neutral relations. There are also five appendices, containing the Declaration of Paris of 1856, the Instructions for the Government of Armies of the United States in the Field of 1863, the Geneva (Red Cross) Convention of 1906, The Hague Conventions of 1907 and the Declaration of London of 1909. The Hague Conventions of 1907 have not all been ratified; and the failure of the Declaration of London is rendered probable by the rejection of the Prize Court Bill by the House of Lords in England. The printing of the texts is, however, a useful thing, and will enable students to study intelligently the discussions that have recently taken place upon the rejected as well as upon the accepted acts.

With the invention of the aeroplane, warriors began to see visions of conflicts between armies in the air; but, fortunately, the first battle of the kind that we are to witness is that between the proponents of various theories as to the legal control of ethereal navigation. A substantial contribution to the discussion is made in *Air Sovereignty* (The Hague, Martinus Nijhoff, 1910; 86 pp.), by Dr. J. F. Lycklama á Nijeholt, a woman. Of the three theories that have usually been advanced, namely, (1) unrestricted freedom of passage, (2) freedom of passage, subject to the right of the state to impose restrictions, and (3) a zone of territorial air, analogous to territorial waters, the author accepts none in its entirety, but contends that the ground-state should exercise full sovereignty over the air-space above its territory, this being, as is maintained, most in harmony with existing law. The volume has two useful appendices, containing a bibliography of the subject, a citation of pertinent texts from the private law of various countries, and references to legal literature relating to the extent of the rights of the landowner in the airspace above his land.

A history of the fishing industry in the waters adjacent to the coasts of British North America, so far as it concerns the New England states, is given in *A History of the New England Fisheries* (Publications of the University of Pennsylvania; New York, D. Appleton and Company, 1911; 457 pp.), by Raymond McFarland. The political

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and diplomatic aspects of the subject fill, however, a much smaller relative space in this volume than is usually allotted to them, more emphasis being laid upon the economic and industrial features of the business, which have been so generally neglected. The negotiations of 1814 occupy only a page, and those of 1818 scarcely two pages. Probably the author was of opinion that these topics had been so often and so fully dealt with elsewhere that a fresh discussion of them was unnecessary. His statement that the British commissioners at Ghent found the grounds of the American demands to be "impregnable," while there were "no justifiable reasons" for the British demand for the free navigation of the Mississippi, is open to question, since the latter contention had precisely the same basis as that of the survival of the fishery privileges, namely, the alleged perpetuity of the treaty of peace of 1782–83. Nor are the concessions made by Messrs. Gallatin and Rush in the convention of 1818 to be ascribed to any failure on their part to appreciate the importance which the inshore privileges would assume. They made the best bargain attainable under the circumstances. The United States never was able successfully to maintain its contention that the words "rights" and "liberties," as used in the treaty of 1782–83 to denote different things, were legally indistinguishable; and the final failure of this contention is recorded in the award of the Tribunal of Arbitration at The Hague of September 7, 1910, which the author prints as an appendix to his volume. He also gives a useful bibliography. He has done his work in a painstaking manner and is temperate in his expressions of opinion.

Contrary to the indication furnished by the title, *The French Blood in America*, by Lucian J. Fosdick (New York, The Baker and Taylor Company, 1911; 448 pp.), is not a study of the work of the French in the development of the new world, but a compilation of data intended to glorify the achievements of the Huguenots. Beginning with an account of the rise of Protestantism in France, the book sketches the early attempts at Huguenot settlement in Brazil, Florida and Canada and then tells at some length of the contributions of French Protestants, individually and by families, to the history of the thirteen colonies and, in some measure, of the United States. To those who can trace their ancestry to the Huguenots the material offered will doubtless possess considerable interest.

Three Wisconsin Cushings (Madison, 1910; xiv, 109 pp.) is the title of a sympathetic and readable sketch, by Theron Wilber Haight, of the ancestry and military career of certain members of a pioneer family of the state. The book is the third in a series of "Original

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Papers" published under the auspices of the Wisconsin History Commission.

In *J. L. M. Curry, A Biography* (New York, The Macmillan Company, 1911; xx, 468 pp.), by Edwin Anderson Alderman and Armistead Churchill Gordon, the story is told of the varied career of a gifted and singularly attractive man. Born in 1823, in a primitive community in the northeastern corner of Georgia, but emigrating later to Alabama; a student in South Carolina, in Georgia and then at Harvard; a lawyer, a recruit for the Mexican war and then a farmer; a member of the Alabama legislature, a representative in Congress and an earnest and unflinching advocate of the doctrines of Calhoun, he naturally resigned his seat in Congress when Alabama adopted an ordinance of secession from the Union. He served in the Confederate Congress first at Montgomery and then at Richmond, acting on occasion as speaker *pro tempore* of the House. When defeated for reëlection, he joined the Confederate army, and served for a time as special aid to General Joseph E. Johnston. The war ended, he became a college president, was ordained as a Baptist minister and devoted himself to preaching and to educational activities. His political disabilities were removed on March 2, 1877; next day, his old classmate at Harvard, President-elect Hayes, offered him a place in the cabinet, which he declined. The rest of his life was devoted chiefly to educational work in the South, as agent of the Peabody Fund and in other capacities; but he held the post of minister to Spain under the first Cleveland administration, and attended the coronation of King Alfonso as special ambassador. Dr. Curry was a man of strong feelings and tenacious of his opinions, but he could rise superior to disappointments and wasted little time in vain regrets. The narrative here given of his life is written sympathetically. Perhaps its value from the point of view of general history might have been increased by more liberal and less guarded extracts from his diaries and memoranda. In this particular, however, the authors have followed the example set by their subject in his own writings.

Among changes that are occurring in methods of creating rational public opinion as a basis for legislation few are more hopeful than the establishment of state associations for the serious discussion of local political, social and economic questions. Other commonwealths may well take the Minnesota Academy of Social Sciences as a model in this movement. Its fourth volume of *Proceedings* (1911; vii, 241 pp.), issued under the editorship of the secretary, Prof. William A. Schaper of the University of Minnesota, provides more than an example to imitate. Its subject matter is of more than local value. The reports

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upon the water supplies of the state, for instance, discuss conditions of pollution and methods of purification that in principle are universal. Likewise the discussion of workmen's compensation not only contains definite criticism of existing statutes in other states but considers the constitutional aspects of legislation in this field. The complete drafts of two bills for a workmen's compensation code and the discussion upon them should not be overlooked even by an expert. The papers on the criminal trial, on probation, on the juvenile court and on feeble mindedness in relation to crime also contain statistical information that should materially assist in guiding social legislation in every state. The proceedings should be made readily accessible to every legislative body. It is to be hoped that other libraries will add their names to those already on the subscription list.

An interesting and noteworthy study in municipal problems is *The History of the Government of Denver with special reference to its Relations with Public Service Corporations* (Denver, The Fisher Book Company, 1911; xvi, 322 pp.), by Dr. Clyde L. King, of the University of Pennsylvania. The author, who was for two years a member of the faculty of the University of Colorado, has had exceptional opportunities to secure first-hand information and has drawn largely upon sources not ordinarily open to the investigator. Public men in Colorado, who have been prominent figures in the movements narrated, have put at his disposal their intimate personal knowledge. The book weaves together skilfully the history of structural changes in government with the social and industrial development of Denver and Colorado and with party conflicts and the relations between "big business" and politics. The author abundantly justifies his contention that the problems of Denver are typical of those with which American municipalities are generally confronted. Partisan politics, state boards and home rule, corporation control of council and courts, the relations between mayor and council and between the various administrative departments and the mayor, the control of vice—these and many other typical municipal problems have presented themselves in more or less acute form in Denver, and Denver's experience with them, as told by Dr. King, throws much light upon the solution of these problems in other cities. The book concludes with a discussion of commission government for Denver. As that city is now in the midst of a contest — temporarily held up by litigation — over commission government, Dr. King's book has awakened special interest there; it has been widely quoted in the press and it has even been cited by attorneys in the arguments before the local courts over the legality of com-

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mission government. It is thus a rather notable exception to the rule that scientific studies in politics are usually reflections on what is past rather than factors in the making of the future. The author's style is clear and vigorous.

It gives one "caste" in some circles to declaim against the "muckrakers"; but future historians will probably be able to estimate more accurately than contemporary students can what a force the muckraking movement has been in the regeneration of our social life. In *Business, The Heart of the Nation* (New York, The John Lane Company, 1911; 291 pp.) one of the most prominent figures in this movement, Mr. Charles Edward Russell, deals with the phenomena of corruption and graft that have characterized the close connection between business and politics in this country; and his conclusion is that in socialism alone is an adequate remedy to be found.

The well-known socialist editor, Mr. A. M. Simons, has undertaken the rather ambitious task of furnishing an economic interpretation of American history. *Social Forces in American History* (New York, The Macmillan Company, 1911; 318 pp.) is clearly and interestingly written, and it succeeds in emphasizing certain points that have perhaps not been sufficiently dwelt upon in the ordinary histories; but, as was to be expected from the previous work of the author, the point of view is wholly one-sided and the book suffers from exaggeration. The last chapter is characteristically entitled "The Triumph and Decadence of Capitalism" and is meant as a clarion call to socialism. The scientific value of the work can best be illustrated by the fact that in the four or five chapters dealing with the economic conditions in the colonies we find not single reference to the epoch-making works of George Louis Beer on British colonial policy. To be fair, however, it should be said that the false impressions which the book conveys are due less to misstatements than to suppressions: the author's faults are rather of omission than of commission.

Dr. Simeon D. Fess remarks, in the preface to his *History of Political Theory and Party Organization in the United States* (Boston, Ginn and Company, 1910; vi, 451 pp.), that the book is intended to be more than a text, that "it should appeal to that large portion of our citizens" who are interested in matters of general public concern. "Intelligent participation in governmental affairs depends upon widely diffused knowledge of our political system." Of that political system, however, the author really tells nothing. He says not a word about committees, primaries, conventions, caucuses (after 1824), ballots or campaign contributions. The element of political theory is represented

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by vague phrases and misty abstractions. There are some passages of the book which an ordinary mind might consider meaningless. "The peculiar type of American political theory is easily observed—a type peculiar in itself, especially when compared with those of European countries. While following the general course of political theory of all modern governments, the American type has taken on a character different from all the others" (page 435). We are not vouchsafed any description of this "peculiar type," but we are told that "heredity helped furnish the seed and environment assisted in preparing the soil." And again: "With the general intelligence of the masses rest the strength of American political theory and the justification of party organization in the United States" (page 443). Nevertheless, there are some chapters, such as those on "Third Parties" and "Daniel Webster, the Exponent of Constitutional Supremacy," in which the convenient and orderly arrangement of old materials may be serviceable to beginners.

Professor J. W. Garner's *Government in the United States* (New York, American Book Company, 1911; 416 pp.) is evidently intended for use in the secondary schools. In many respects it is well suited to that purpose. It is written simply and without the mass of detail which so often bewilders and discourages the student; and each chapter is provided with a carefully selected bibliography, a list of research questions and suggestions for obtaining illustrative material, such as documents, reports and legislative manuals. In view of the purpose of this book, however, it is perhaps proper to note that there is not a photograph or map or diagram in it; that, although the author believes that he has given more than the usual emphasis to the dynamics, or actual working, of government, he considers the Articles of Confederation important enough to appear as one of the two documents given in the appendix; and that, according to the new fashion, he postpones consideration of the national government till the latter part of the book —a method of presentation which has been endorsed by not a few teachers, but which has very serious disadvantages.

Sir Courtenay Ilbert, clerk of the House of Commons and author of *Legislative Methods and Forms*, has contributed to the Home University Library a little volume on *Parliament* (New York, Henry Holt and Company, 1911; 256 pp.). It is a book of great merit and may be consulted profitably even by those who are familiar with their Anson and their Lowell. Sir Courtenay writes with intimate knowledge and with discretion in its use. His object being to describe the actual working of Parliament, he has broken free from the temptation to ob-

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trude history and precedent at every point and has given a description which is singularly clear and direct. There are chapters on the constitution, organization and procedure of the House; the relation of the member to his constituents; the relation of Parliament to the public; the making of laws; finance; the House of Lords. In a final chapter Parliament is compared with other great legislative bodies, including Congress. A short, critical bibliography is given as an appendix.

The fourth volume of William Foster's *English Factories in India* (Oxford, The Clarendon Press, 1910; xxxix, 354 pp.) covers the years 1630–1633. It was a time of "universall dearth over all this continent, of whose like in these parts noe former age hath record"; and "men durst scarsly travell in the countrey for feare they should be kild and eaten." The book contains more than three hundred documents, only five of which have been hitherto accessible to students. The intimate life of the factories is laid bare in quaint and graphic language. For the reformation of abuses at Surat rules were adopted in 1633 under which servants of the company were fined forty shillings for absence from the factory during the night, half a crown for absence from daily "praiers," twelve pence for "every othe or curse," and 2*s*. 6*d*. for being "drunck, thereby prostituting the worthiness of our nation and religion to the calumnious censure of these heathen people." Ample evidence is given of the existence of private trading and of the difficulty which the company had in attempting to suppress it. Thus Richard Boothby, dismissed from the Surat council for trading, asserts that "its prohibition by the Council was understood to be merely a matter of form for the Company's satisfaction. . . . Otherwise he would not have dreamt of going to India for £100 per annum" (page 151). It is abundantly clear that others went to India under the same impression. Mr. Foster's introduction takes the form of a detailed narrative with copious references to the text. His editing of the documents maintains the high level of scholarship which the earlier volumes led us to expect.

The first native impetus to the scientific study of classical history in this country undoubtedly came from the teaching of President Benjamin Ide Wheeler during his professional career at Cornell University. It is to one of his pupils, William Scott Ferguson, that we are now indebted for the first connected history of Athens during the Hellenistic age: *Hellenistic Athens, An Historical Essay* (London, Macmillan and Company, 1911; xviii, 487 pp.). In the preparation of this volume the author had the advantage of aid from the Carnegie Institution. Discussions of various critical matters contained in it had previously

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appeared as articles in American and foreign periodicals. The period which the book covers extends from the death of Alexander to the sack of Athens by Sulla in 86 B. C. A general idea of the character of the work may be gathered from the chapter headings: "The First Struggle for Independence"; "The Régime of Demetrius of Phalerum"; "The Democratic Restoration and the Rule of the Moderates"; "The Crushing of Athens between Macedon and Egypt"; "A Generation of Macedonian Rule"; "The Régime of Eurycleides and Micion"; "Athens under the Tory Democracy"; "Athens and Rome"; "Athens and Delos"; "Athens between Rome and Pontus." The author has critically examined all available sources, which he cites with comment in extensive footnotes, thus leaving the text relatively free from evidential and controversial matter. The nature of the sources has made the task a peculiarly difficult one; but Professor Ferguson has accomplished it, as might be expected, with great credit to himself. We have in this volume new evidence that in classical scholarship Americans are achieving something which for independence and substantiality may be placed unhesitatingly beside the best work done in England and on the continent of Europe.

M. Henri Francotte, professor at the University of Liège, long favorably known by his *L'Industrie dans la Grèce ancienne* (reviewed in this QUARTERLY, volume xvi, page 538) as well as by his later work *La Polis grecque*, has now turned his attention to the fiscal aspect of classical antiquity and has published a valuable study on municipal finance, *Les Finances des cités grecques* (Paris, Honoré Champion, 1909; 315 pp.) By making use of the newer monographs on the subject as well as of the most recently discovered inscriptions, M. Francotte is able to present an excellent survey of the system of taxation, not only in what he calls the autonomous cities, but also in the subject or allied cities. The greater part of the book deals with some hitherto neglected phases of fiscal administration and discusses details on which Professor Francotte is able to throw much light. His conclusions are of interest not only to the classical student but also to the fiscal historian.

In 1907 Max von Heckel, professor at the University of Münster, published the first volume of his comprehensive *Lehrbuch der Finanzwissenschaft*, which attracted widespread attention as the first reformulation of the general theory of finance from the German point of view since the great work of Wagner, a quarter of a century earlier. The second volume has now appeared (Leipzig, Hirschfeld, 1911; xvii, 540 pp.). Almost half of this volume deals with what we are accus-

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tomed to call excises, the remaining half being divided between the public domain and public industry on the one hand and public debts on the other. The book is marked by the same characteristics as its predecessor—admirable arrangement, conciseness, and great wealth of information. There is no straining after effect and no attempt to advance novel views. What the work lacks in the way of illuminating generalization it more than makes up in mastery of detail and sobriety of judgment. It will be found a useful work of reference. The author promises the third and concluding number in two years.

Of a very different character is the treatise on finance by Professor A. Graziani, of the University of Naples, entitled *Instituzioni di scienza delle finanze* (Milan, Fratelli Bocca, 1911; xvii, 785 pp.), which now appears after a lapse of fourteen years in a second edition. From the point of view of scientific discussion, Professor Graziani's book has won for itself the reputation of being in some respects the best of all existing treatises on finance. Following a method quite the opposite of Heckel's, Graziani devotes comparatively little attention to details of facts, but devotes his chief energy to discussion of the underlying principles and of the views of other authorities in the field. The second edition brings the discussion down to date. In almost every chapter we notice the influence of the recent movement of theory, not only in the important countries of Europe but also in the United States. Of all the European works on the science of finance, it is perhaps this treatise of Graziani that best deserves translation into English.

Since the appearance in 1898 of Urdahl's *The Fee System in the United States*, there has been no study of the general subject from the newer point of view. Signore Alfredo Vita has now attempted this task in *Le Tasse nella dottrina scientifica* (Milan, Societá Editrice Libraria, 1911; xi, 250 pp.). The work was originally prepared for the Italian Encyclopædia of Law, and, as a consequence, the author devotes much attention to Italian administrative conditions. He tries, however, to bring the legal and administrative considerations in each class of fees into relation with economic theory. His knowledge of theories unfortunately seems to be rather closely limited to those set forth by Italian and German writers.

Money's Fiscal Dictionary (London, Methuen and Company, 1910; vii, 315 pp.) is the rather broad title of a book written by Mr. L. G. C. Money, M. P., frankly in favor of free trade as against protection. The book is evidently patterned after Palgrave's *Dictionary of Political Economy*, but instead of being a really inclusive fiscal dictionary it covers only such items and persons as are directly or indirectly con-

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nected with the subject of "tariff reform" in Great Britain. Furthermore no opportunity is lost in the elucidation of terms to attack the position of the protectionists. Allowing for this obvious bias, the book should prove useful.

The New Dictionary of Statistics (New York, E. P. Dutton and Company, 1911; 682 pp.), by Augustus D. Webb, is characterized on its title page as "a complement of Mulhall's *Dictionary of Statistics*." The choice of sub-title is unfortunate, because the new work may be judged by the imperfections of its predecessor. Such a compilation of facts on a great range of topics, for ready reference, is valuable, provided the sources of information are cited and provided there is discrimination in the selection of material. Mulhall's *Dictionary* failed to meet either of these requirements. The reader was expected to trust the compiler in regard to the trustworthiness of the data. But under such conditions the cautious student hesitated to use the data, not because he feared that the compiler would deceive him, but because he could not be sure whether the figures suited his purposes until he knew the sources, their scope, accuracy and completeness. Mr. Webb has avoided this criticism by citing the sources of information. Therefore, the new dictionary is to be received on its own merit. It has abstracted a fund of useful material, arranged by topics in alphabetical order, and will either supply the need of the reader for facts or will guide him to the more detailed sources.

In *Die geschichtliche Entwickelung des Zinsfusses in Deutschland, 1895–1908* (Leipzig, Duncker and Humblot, 1910; xii, 210 pp.), by Dr. Herman Albert, we have, for the period specified, a masterly study of the history of the interest rate in Germany. The study is especially significant because of the extraordinary industrial development that Germany has achieved during the period studied; and in that development the author finds the main influences that have determined the drift of the interest rate. Moreover, he believes that the big movements that are still going forward in German industrial life will tend to carry the interest rate to even higher levels than before.

A Short History of Money in the British Empire and the United States (London and New York, Longmans, Green & Company, 1911; xiv, 356 pp.), by Miss Agnes F. Dodd, ought to prove very attractive to the general reader who is interested in the subject of monetary history, but who is, nevertheless, not afflicted with the specialist's passion for all possible details. This history will be useful also to the teacher of money and banking, who needs just such a book for the collateral reading of his classes. About two-thirds of the volume is devoted to

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British monetary history, while the last third summarizes American experience. Miss Dodd's theory of money is a modified quantity theory; but of course each reader can interpret the historical facts presented according to his individual leanings. The subjects of banking and paper money receive sufficient attention, and the inevitable reactions of the systems of other countries upon those of Great Britain and the United States are recognized and adequately set forth.

A very sensible consideration of the relation between the output of precious metals and general prices in the past, and of the relation between the present gold output and the tendencies in that output and the upward movement in prices to-day, is found in Mr. Harrison H. Brace's *Gold Production and Future Prices* (New York, The Bankers' Publishing Company, 1910; iv, 145 pp.). As far as history is concerned, Mr. Brace relies on the accepted secondary sources, quoting Jacob, Adam Smith, Thorold Rogers, Jevons *etc.*, and he presents the usual conclusions. Also in his consideration of the tendencies toward an increase in the future supply of gold and of the counter-balancing tendencies toward an increase in the demand for it, it must be admitted that there seems to be little that is new. But the treatment of the subject is so calm and fair, the style is so simple and direct, and the conclusions arrived at are so sane and reasonable, that for the general reader the book is much more useful than one crowded with references and burdened with the minutiæ of scientific discussion.

The havoc and destruction wrought by depreciated, irredeemable, legal-tender paper money has been so abundantly illustrated by experience in the past that it would seem reasonable to assume that by this time civilized nations would have learned to shun it. Yet in his *Chile*, 1851–1910 (Valparaiso, Chile, Westcott and Company, 1911; 238 pp.), Mr. Augustin Ross reproduces the old tale in a new setting. All the familiar difficulties and embarrassments have there been experienced and are still being experienced, and yet in the sessions of the Chilean Congress the old and empty sophistries in support of fiat money, long since exploded, as well as inflationist greed, have succeeded in blocking reform. Mr. Ross estimates that one billion dollars in capital have been withdrawn from Chile as a result of the depreciated currency. Yet Chile is a land rich in natural resources, and the establishment of a sound money system would go far to assure her prosperity.

The world phenomenon of rising prices has naturally attracted wide interest. Discussions as to the underlying causes can be found in practically every language of western Europe. The rise in prices in India has occasionally been attributed by writers there to the increase

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in the coinage of the rupees since 1893; but Mr. H. F. Howard, in his *India and the Gold Standard* (Calcutta, Thacker, Spink and Company, 1911; vii, 143 pp.), analyzes the movements of prices in India as well as the currency movements growing out of India's peculiar system, and concludes that the increase in the coinage of the rupees is to be construed as a result rather than as a cause. Of course Mr. Howard recognizes the influence of an increasing world output of gold upon the level of world prices in general and thus also upon the demand for rupees; but his contention is that, owing to internal as well as to external influences, the upward price movement preceded the increased coinage of the rupees.

In *Legal Tender Essays* (London, Kegan Paul, Trench, Trübner and Company, 1900; xviii, 285 pp.), Mr. James C. Smith sets forth a number of proposals for the solution of the problem of poverty and unemployment in the western world. The proposals especially developed in this book—others have been more fully stated by the author in other places—are the fixing of a tabular standard for the settlement of debts and the restoration of the purchasing power of silver. The rehabilitation of silver is urged in order to make again "effective" the demand of the people of the Orient for the products of the West.

A fourth edition of Horace White's well known and popular *Money and Banking* (Boston, Ginn and Company, 1911; xiv, 491 pp.) has just appeared. The new edition brings the discussion of the currency and banking problem down to date. There is an analysis of the Aldrich plan, of which the author approves, and, in the appendix, there is a summary discussion of government guarantee of deposits and of the extent to which this plan has been adopted by the states. As might be expected, Mr. White objects strongly to any such scheme.

The newspaper and the magazine have largely occupied the field of the pamphleteer; but even in these days pamphlets fiercely polemic still occasionally appear to add to the joy of living. One such, condemning in no uncertain terms our present "aristocratic" currency system and advocating the "hierarchical" (sacred right) system has recently appeared. Its author is D. W. Ravenscroft, and its title is *Money and Currency* (Petaluma, California, D. W. Ravenscroft, 1911; 47 pp.) The "hierarchical" system involves the issue of government currency which is to be redeemable in interest-bearing government "debentures," which are in turn to be issued in any amount to persons paying for them. We are assured that "when currency gets scarce in a neighborhood interest rates will rise, and the citizen will surrender his debentures, draw down the currency and relieve the stringency";

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and that when the currency is redundant the reverse process will take place. The "hierarchical" system may be allowed to speak for itself.

In view of the general economic and political conditions in this country and especially of the popular fear of the so-called "money power," a plea in favor of a system of branch banking would seem to be destined to fall on deaf ears. Yet in his work entitled: *A Rational Banking System* (New York and London, Harper and Brothers, 1911; 329 pp.) H. M. P. Eckardt makes such a plea; and his plea is one that carries with it a large measure of conviction to the open-minded student. The author shows clearly that, within limits, large-scale banking, like large-scale industry in general, is more efficient than the activity of a large number of small competing organizations. He holds that the political objections usually advanced are largely unwarranted, although he does not underrate their significance as far as the prospect for reform is concerned. The book is a real contribution to our literature on practical banking, and, in view of the form of the proposed banking legislation now before Congress, it ought to attract considerable attention.

With slight changes in phraseology, corresponding to changes in his views, Professor O. W. M. Sprague, of Harvard, has republished under the title: *Banking Reform in the United States* (Harvard University Press 1911; 176 pp.) the four articles on this subject that appeared originally in the *Quarterly Journal of Economics*. In these earlier articles Professor Sprague maintained that a central bank was undesirable in the United States; but in the book he favors a modified central bank, based upon the existing system, and limits his objections to the central bank of the European type.

The mysteries of the money market are perennially attractive although usually very exasperating to the beginner; but Mr. D. A. Barker has written for Englishmen a little manual entitled *Cash and Credit* (Cambridge University Press, 1910; 143 pp.) which promises to minimize the exasperation. It explains as simply as possible the fundamental operations in the money market and thus prepares the reader for more comprehensive discussions. The verbal explanations are in several instances further supported by ingenious mechanical illustrations. Although the manual is written from the English point of view it ought nevertheless to be useful to the American reader.

There are already in print numerous studies of the London money market written from many points of view. In *The Mechanism of The City* (London, P. S. King and Son, 1910; vii, 172 pp.), Mr. Ellis T. Powell, known in America as the author of *The Essentials of Self*

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Government, gives us something new. Instead of analytical description Mr. Powell supplies an interpretation. He is not concerned so much with the minute details of the "how" as he is with the principles and the "why." In the development of the great machine the tendency, according to Mr. Powell, has been toward the democratization of investment and speculation, and in this he sees a barrier against the rising tide of socialism.

Francis W. Hirst, editor of the British *Economist*, is an English economic publicist whose writings have won an enviable reputation in America. He is endowed with a gift for happy expression as well as with understanding and experience. In *The Stock Exchange* (New York, Henry Holt and Company, 1911; 256 pp.), published in The Home University Library of Modern Knowledge series, Mr. Hirst has contributed "a short study of investment and speculation" that ought to prove very useful to the layman. The little book supplies, first, the necessary historical background, then a description of the London and New York security markets, and finally a concise discussion of the principles and methods involved in investment and in speculation. It is marked throughout by clearness, straightforwardness and fairness.

In his book on *Property Insurance* (New York, D. Appleton and Company, 1912; 388 pp.), Mr. Solomon S. Huebner's purpose is to present "the important theoretical and legal principles and the leading practices upon which the business is based." The book was prepared as a text for college and university students. The first part, which occupies twenty-one of the thirty-one chapters, deals with fire insurance. Of these twenty-one chapters fourteen treat of the policy or of the legal aspects of fire insurance. Other chapters discuss such topics as fire rating, fire prevention and state regulation. For the purposes of students in economics it would seem that the legal aspects are emphasized at the expense of the economic functions of insurance, the business organization and operation of companies and the very important subject of rating, about which so many of the real problems of fire-insurance center. The second part discusses marine insurance in a very satisfactory manner. The third part is devoted to bonding, title and credit insurance. This is the kind of insurance which is undergoing most rapid changes, and during this experimental stage it is difficult to give a detailed discussion which will harmonize with the changing facts. The author has apportioned his space well among the three kinds of insurance discussed. Greater opportunity for difference of opinion exists as to the relative emphasis given to topics within the apportionment. The book includes sample policies, forms and agree-

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ments. Since these are, in many cases, continually changing and since they are easily obtained for class purposes, it may be questioned whether it is wise to encumber a book with this class of material. A bibliography is given of the works in English on the kinds of insurance treated. The literature in English on all kinds of insurance, except marine, is pathetically voluminous, but it is only in German and French that we find really scientific literature on the subject. Professor Huebner has given us in this book the best discussion that has yet appeared in English on property insurance which lends itself for use as a text, and it deserves to be highly recommended for this purpose.

A second edition of the *Outline of Economics* (University of Chicago Press, 1911; xvi, 144 pp.), prepared by the members of the Department of Political Economy of the University of Chicago, has now appeared. The original scheme is retained, but there has been a fairly general revision of details and there is some rearrangement of the discussion and of the questions. While perhaps no two teachers of economics would use the book in just the same way, because of different theoretical predilections, all will find it useful and helpful.

That the ideas of Fourier still exert considerable influence in France is attested by the recent volume of E. Silberling: *Dictionnaire de sociologie phalanstérienne: Guide des œuvres compiètes de Charles Fourier* (Paris, Marcel Rivière, 1911; 458 pp.) Inasmuch as Fourier's works have long been out of print, it occurred to M. Silberling that it would be a good idea to arrange his fundamental doctrines under a number of catchwords. Later, M. Silberling extended his plan, and he now not only presents the theories but gives an explanation of every term used by the master. The result is a dictionary of several hundred terms, with definitions or explanations ranging from a single line to a dozen pages in length. The idea is a novel one, and the work will no doubt be found useful for reference by students of French socialism.

Miss Gertrude Toynbee has edited an interesting little volume about her father and brother, under the title of *Joseph and Arnold Toynbee* (London, Henry J. Glaisher, 1911; 193 pp.). The character of the father as disclosed in these letters enables us to understand the son. "One of the secrets of our father's power of enjoyment," we are told, "is that he kept his spirit free from petty thoughts and worries and so was awake to the beauty and wonder of the universe, and he was always learning new truth." With reference to Arnold Toynbee his sister states that "Arnold was akin to the saints and the prophets in his power of spiritual appeal and in the revelation his presence made of

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his beautiful inner life. He seemed at times to be an ethereal visitor from another world, and yet he was at one with the simplest human being and with the rough and the ignorant and the faulty." To all admirers of Toynbee, and their number is legion, the little book will be most welcome.

In *The Record of an Adventurous Life* (New York, The Macmillan Company, 1911; 422 pp.), Mr. Henry Mayers Hyndman, the veteran *intransigeant* of the British socialist movement, gives us an attractive autobiography. It deals far less intimately than might have been expected with the details of his socialist career. Most interesting are his chapters on Disraeli, on Karl Marx and on William Morris, in which will be found matter of no little value to the historian of socialism.

M. Yves Guyot, the well-known editor of the *Journal des Économistes*, has written a book on the recent railway strikes in France: *Les Chemins de fer et la grève* (Paris, Félix Alcan, 1911; xiv, 329 pp.). M. Guyot was minister of commerce during the earlier period of the disturbances, and it was in large measure due to his decided attitude that a strike was averted. He considers the failure of the ministers who succeeded him to follow his policy as responsible for the outbreaks of 1910; and with his accustomed vigor he formulates the views and conclusions of the extreme individualist, whose chief concern is the maintenance of order. His comments on the limitations of the right to strike in the United States are not very satisfactory, as they are based on inadequate information.

The need for a comprehensive system of inland waterways in this country is being increasingly felt and is being constantly emphasized by students of transportation, and we have a congressional commission at work on the subject. What we might have done had we handled the matter sensibly from the start is brought home to us by Mr. Edwin J. Clapp, who in *The Navigable Rhine* (Boston, Houghton, Mifflin and Company, 1911; xvii, 134 pp.) gives an admirable description of the way in which the traffic of that river has been developed by the thrifty Germans. He gives not only an historical review of public policy in the matter of rates and navigation, but also a clear description, reinforced by illustrations, of the many improvements that have been made in promoting the usefulness of the Rhine as a highway of commerce. By way of contrast Mr. Clapp devotes a chapter at the end to a review of the American handling of the Mississippi. Mr. Clapp's book will enhance the reputation of the Hart, Shaffner and Marx Prize Essays. *The Navigable Rhine* took the first prize in the year 1909–1910.

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A rapid narrative of "a journey from the Great Wall of China to the skyscrapers of Manhattan" is given by Marcus Lorenzo Taft in *Strange Siberia: Along the Trans-Siberian Railway* (New York, Eaton and Maine, 1911; 252 pp.). It deals with steamers, railways, scenery, hotels, police, religions and political and social conditions. The precise time consumed in the journey is not given. There are twenty-one illustrations. The volume concludes with a reference to a quick return voyage from England to New York by the *Lusitania*, and a reminder of the fact that Robinson Crusoe's last exciting journey was from China through Siberia and Russia to England.

Those who are unfamiliar with the conditions prevailing among our continental neighbors immediately to the southward will find a fair amount of entertainment and instruction in Wallace Gillpatrick's *The Man who likes Mexico* (New York, The Century Company, 1911; 16, 374 pp.). The book consists of a series of friendly impressions gathered on many a journey and put together without much pretence of order, other than that of recurring to Mexico City as a point of departure. When incident and reminiscence are uppermost in the author's mind the impressions are at their best; but to give the work the sub-title of a "spirited chronicle of adventurous wanderings" is somewhat of an overstatement.

Though seemingly written more from books and articles than from a personal acquaintance with the country itself, W. A. Hirst's *Argentina* (New York, Charles Scribner's Sons, 1910; xxviii, 308 pp.) is a historical and descriptive work of considerable merit. The illustrations, the map and the list of books relating to the Argentine Republic form a satisfactory supplement to an account which, if not altogether accurate or very inspiriting, is quite informative. Like its predecessors in the South American Series, the work devotes too much space to history, has an inadequate index and derives no particular advantage from its introduction. However learned in the history of Spain, the late Martin Hume was not a trustworthy introducer to the past of Spanish America. One might wish, incidentally, that Mr. Hirst were better acquainted, at least orthographically, with the "Munroe" Doctrine (pages 83, 169, 306); that he would not obtrude his religious views on educational matters (page 162); that he knew enough of *La Prensa* to refrain from saying that "sobriety and moderation" were the characteristics of that newspaper (page 164); that he would tell us more about living magazines and less about dead ones (page 166); and that he would explain why he has so strong an antipathy to the Royal Mail Steam Packet Company (pages 284, 285).

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